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Supreme Court, U.S.
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No. 02-1736

In The

Supreme Court of the United States

JAMES B. TWISDALE,

Petitioner

v.

JOHN W. SNOW, Secretary of the Treasury,

Respondent

On Writ of Certiorari to the
Untied States Court of Appeals
For the Seventh Circuit

BRIEF FOR THE PETITIONER

JAMES B. TWISDALE
103 E. MCCLURE DR.
SCOTT DEPOT, WV 25560
304-757-4738
July 3, 2003

QUESTIONS PRESENTED FOR REVIEW

Introduction to Question 1

The Seventh Circuit ruled that the protection offered under *42 U.S.C. 2000e-3(a)* is restricted to only employees who have made a charge of discrimination. Stating that the issue "is both clean and novel" and no case law or scholarly commentary existed. Case law and scholarly commentary does exist, all of which supports a literal and all inclusive interpretation as intended by Congress.

1. Does the protection offered under Section *42 U.S.C. 2000e-3(a)* for employees who have made a charge, testified, assisted, or participated in any manner in an EEOC investigation apply to all employees with no regard to their role in the alleged acts of a Title VII violation?

Introduction to Question 2

The Seventh Circuit in its analysis of a hostile work environment did not apply the standards established by the Supreme Court in the cases of *Harris v. Forklift Systems, Inc* and more recently *Oncale v. Sundowner Offshore Services, Inc.* correctly. The court below further imposed new criteria that subsequent job assignments and a promotion will cancel out any previous inflicted harassment.

2. Did the Plaintiff suffer a hostile work environment sufficient to affect his compensation, terms, conditions, or privileges of employment, under *42 U.S.C. 2000e-2(a)(1)* and if so, would other job assignments, performance bonuses and a promotion cancel out the harassment?

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STATEMENT OF THE CASE

Mr. Twisdale, the Plaintiff, filed a complaint and demand for jury trial on May 26, 2000, bringing an action as redress for Title VII claims for discrimination, hostile work environment and retaliation. The Appellee filed its answer to Twisdale's complaint on August 29, 2000. On April 9, 2001, the Defendant's Motion for Summary Judgement and accompanying documents were filed. Twisdale's Response Brief in opposition to Defendant's Motion for Summary Judgement and accompanying documents were filed on October 17, 2001, and the Appellee's Reply Brief in Support of Defendant's Motion for Summary Judgement and accompanying documents were filed on December 17, 2001.

On February 27, 2002, the District court granted the Defendant's Motion for Summary Judgement on both of Mr. Twisdale's claims. On the same day the district court entered final judgement in favor of the Appellee Paul H. O'Neill. On March 22, 2002, Mr. Twisdale timely filed a Notice of Appeal.

On July 11, 2002, Mr. Twisdale filed his Appeal Brief with the Seventh Circuit. On August 12, 2002 the Defendant-Appellee filed their Response Brief. Then on August 23, 2002 Plaintiff-Appellant filed his Reply Brief.

On April 10, 2003, the Seventh Circuit affirmed the District Court's judgement.

SUMMARY OF THE FACTS

Mr. Twisdale, the Plaintiff (Twisdale), a White male began his career working for the Internal Revenue Service (IRS) in July 1981 as a GS-7 Revenue Agent. Twisdale was promoted three times from 1982 to 1986, resulting in a GS-12 Revenue Agent status. Between 1987 and 2000 Twisdale

served the IRS in the following progressive responsible positions: Examination Group Manager as a GM-13, GM-14 Senior Regional Analyst, GM-14 Supervisory Regional Team Leader, GM-14 Field Examination Branch Chief, and GM-14 Quality Measurement Branch Chief. From 1994 to 2000 Twisdale has spent his career in the Indiana District in Indianapolis, Indiana. In 1997 James Rogers, (Rogers) African-American male became District Director in the Indiana District.

In his capacity as a second level supervisor, Twisdale signed off on Barry Madison's (B. Madison), an African-American female, evaluation rating her all 3's which is fully successful. The Evaluation was initiated by B. Madison's immediate supervisor, Mary Lue Graham, a White female.

B. Madison filed a charge of discrimination against her immediate supervisor, for giving her an evaluation less than what she expected. It was stated by Rogers that B. Madison had implicated Twisdale as a "discriminating official." Twisdale participated as a witness in the EEO investigation since he approved the evaluation and also participated as a supervisor charged with resolving the complaint. Unable to resolve the complaint, the matter was elevated to Rogers who did resolve it by giving B. Madison her demands. Neither Twisdale nor Graham was ever charged with discrimination or any other offense.

During this same period Twisdale was ordered by his immediate supervisor, Barry Whaley, White male, to investigate B. Madison for alleged acts of misconduct. The investigation resulted in Twisdale issuing B. Madison a letter of counseling for lying.

Then on February 10, 1998 Rogers held an impromptu senior staff meeting and ordered Twisdale to attend and address why he was investigating B. Madison. Rogers who

is 3 levels senior to Twisdale, insisted the investigation of B. Madison was not necessary. Rogers learned of the investigation directly from B. Madison earlier that day which prompted the meeting.

The next day Twisdale was ordered to meet with Gayle Morin (Morin) a White female and the Assistant District Director, Rogers's immediate subordinate and ordered Twisdale to continue the investigation.

Then on March 11, 1998 Twisdale was notified by his acting supervisor that Rogers had ordered him to reassign all the employees in Twisdale's Disclosure Office. This is the same office that B. Madison worked in. An explanation was not provided. Rogers admits that at the time he ordered the reassignment of all of Twisdale's Disclosure Office personnel he had no problem with any of the people in that Office. The reassignments, however, were never carried out.

Then on April 10, 1998 Twisdale was informed that Rogers had ordered the internal audit of the Disclosure Office citing alleged privacy act violations. The audit was a "Single Office Audit" as defined by the IRS Internal Revenue Manual and required Regional Commissioner approval. There was no evidence that approval was ever asked for or provided prior to the audit taking place. Furthermore, the audit was executed despite a positive routine Regional review of the same office only months earlier. This was the first and only "Single Office Audit" ever requested by Rogers and ever performed in the Indiana District. Rogers acknowledged that there had been a recent review of the Disclosure Office at the time of the Internal Audit. He did not recall studying the prior report which was complementarily of Twisdale. Rogers admits to not having any conversation with Twisdale's immediate supervisor about any major problems in the disclosure function or his intentions to order an Internal Audit. Rogers never made a

claim that the Disclosure Office was not operating at a high quality manner. Rogers never discussed his request for the Internal Audit with his supervisor. Rogers had no specific information about the Disclosure Office that would have prompted him to request the audit. Results of the audit were very good and vindicated Twisdale of any Privacy Act violations.

Twisdale, on May 11, 1998 initiated a formal request for EEO Counseling citing "Working Conditions." The Counseling went to a formal request for an investigation on July 24, 1998 citing discrimination because of Race and Color. The Complaint was modified on August 17, 1998 to include "Retaliation".

On March 10, 1998 Twisdale issued a memorandum of counseling to B. Madison for lying. In June or July 1998 Mary Murphy, (Murphy) African-American female, Twisdale's new immediate supervisor had the memorandum withdrawn at the request of B. Madison through an Agency Grievance Process. Counseling memorandums are to remain on file for two years. Murphy acknowledged that E. Madison lied but still removed the memorandum.

Then on April 16, 1998 Twisdale was informed his Problem Resolution Program in his Quality Branch was to be reviewed. The review like the internal audit was unprecedented in the history of the District. Three subordinate managers were used to conduct the review. Twisdale rebuts the review report on July 9, 1998 citing disregarded directives, insubordination, untruthful statements, inaccuracies and protocol violations. Despite the documented concerns the report was never officially withdrawn.

On August 5, 1998 Twisdale initiated the formal request for EEO Counseling citing "Harassment." The Counseling

went to a formal request for an investigation on October 17, 1998 citing discrimination because of "Race", "Color" and "Retaliation".

During 1998, 1999 and 2000 Twisdale sought employment with other Government agencies as well as employment in other locations within the IRS.

On November 19, 1998 Everette Madison, (E. Madison) a senior supervisor who is African-American and husband to B. Madison alleged in a memorandum to Twisdale's supervisor, Murphy, and the IRS Inspection Service that Twisdale took IRS records, caused a serious breach of security, abused his managerial authority and made an unauthorized disclosure. This resulted in a criminal investigation and Twisdale's subsequent clearance.

On March 18, 1999 Twisdale initiated the formal request for EEO Counseling citing "Harassment and Working Conditions."

In December 1998 Murphy reassigned the Disclosure Office away from Twisdale and reduced his management span of control by 50%. Murphy did not provide any compensating resources or programs.

On August 2, 1999 Twisdale submitted a memorandum complaining about continued acts of retaliation from another employee. This resulted in his immediate removal from his only acting assignment.

From June 22, 1998 through March 17, 2000 Twisdale was bypassed 156 times for acting Division Chief assignments in favor of 10 actors that did not possess the same permanent grade, experience and promotability as him. In fact, all 10 people were not promotable to the GS-15 level which is the level of a Division Chief.

On September 9, 1999 Twisdale initiated the formal request for EEO Counseling citing "Working Conditions." The Counseling went to a formal request for an investigation on November 2, 1999 citing "Retaliation".

Twisdale was treated for colitis on August 26, 1998, November 3, 1998 and again on January 29, 1999. His Colitis is triggered by stress that can not be resolved, stress that appears to have no end.

From 1998 to 2000 Twisdale served on 4 committees or taskforces. He also received an automatic bonus that when along with his performance rating. In May 2000 Twisdale was selected for a promotion to the GS-15 level through a competitive process. None of the alleged discriminating officials were involved in Twisdale's selection.

INTRODUCTION AND SUMMARY OF ARGUMENT 1

Employees who participate in an EEOC investigation have long enjoyed the protection against retaliation offered by *42 U.S.C. 2000e-3(a)*. This is because the law is very specific and provides a shield from reprisal against any employee who "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter" (the "participation clause"). *Id.* This protection has been unconditional and unchallenged by any Appellate court until now. The Court below in its decision has rewritten the law to exclude both "assisted" and "any manner" from the statute only to insert a restrictive interpretation. In doing so, only employees who participate as a witness for the employee and the employee him/herself would receive protection. Employees, who would give testimony, assist or participate in "any manner" other than what the Seventh Circuit has said, would do so at their peril with no protection. The decision may appear to be a

politically correct one, designed to champion only those who are discriminated against but it serves only to chill or prevent the sincere and willing participation of third party witnesses, resolution efforts by supervisors and those falsely accused of discrimination that could bring valued testimony to help resolve a complaint at the early stages. The decision stands alone among all the Circuits and is unsupported by case law. It also conflicts with Congressional intent.

The Court openly admits that this issue "is both clean and novel" It also stated "we cannot find any hints in the case law, the legislative history, interpretations by government agencies, or scholarly commentary of any purpose of protecting employees whose resistance to charges of discrimination made by their coworkers provokes the employers ire". It is suggested that the reason this issue is "clean and novel" is because no one has questioned Congress' intent because the statuary language is clear. However, there is considerable legal analysis on the "participation clause". And in fact there is a 1997 Eleventh Circuit case exactly on point with similar facts that was decided in favor of the employee. See *Meritt v. Dillard Paper Co., 120 F.3d 1181, 1186 (11th Cir. 1997).*

ARGUMENT

THE SEVENTH CIRCUIT ERRED IN INTERPRETING AND APPLYING 42 U.S.C. 2000e-3(a)

I. LEGAL ANALYSIS

The participation clause prohibits employment discrimination against an employee for "filing a charge, testifying, assisting, or participating in an investigation, proceeding, or hearing under this subchapter." *42 U.S.C. 2000e-3(a) (1994).* Congress, however, did not explicitly define the terms "participat[ion] in any manner" or

"investigation ...under this subchapter." While not defined by Congress, the term "participat[ion] in any manner" is clear (The first step in interpreting a statute "is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. [The courts'] inquiry must cease if the statute language is unambiguous and 'the statutory scheme is coherent and consistent' *Robinson v. Shell Oil Co. 117 S. Ct. 843, 846 (1997)* (quoting *United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 240 (1989)*; see also Norman J. Singer, Sutherland Statutes and Statutory Construction 46.01 (5th ed. 1992) (describing plain rule))). and indicates Congress' intent to provide employees covered by Title VII with broad retaliation safeguards. (See *Clover v. Total Sys. Servs., Inc., 176 F.3d 1346, 1353 (11th Cir.1999)* ("The words 'participate in any manner' express Congress' intent to confer 'exceptionally broad protection' upon employees covered by Title VII." (quoting *Pettaway v. American Cast Iron Pipe Co., 411 F.2d 998, 1006 n.18 (5th Cir. 1969))).* "Any," as used in congressional statutes, is not an ambiguous term; instead "it has an expansive meaning, that is, one or some indiscriminately of whatever kind".... "Any" means all. *Meritt v. Dillard Paper Co., 120 F.3d 1181, 1186 (11th Cir. 1997).* It follows that the participation clause protects employees participating in whatever manner in an investigation under this subchapter." *Clover, 176 F.3d at 1353.* Accordingly, the Seventh Circuit has exceeded its authority and in fact legislated new law with this decision.

The federal judiciary has long recognized the participation clause as "essential to the machinery set up by Title VII, (*Glover v. S. Carolina Law Enforcement Div., 170 F.3d 411, 414 (4th Cir. 1999)* (citing *Laughlin v. Metro. Wash. Airports Auth., 149 F.3d 253 (4th Cir. 1998)*) and, accordingly, extended "exceptionally broad protection" to these activities under the participation clause. *(Pettway, 411 F.2d at 1005).* The courts have even held that "protection [under the

participation clause] is not lost if the employee is wrong on the merits of the charge, nor is protection lost if the contents of the charge are malicious and defamatory as well as wrong." *Booker, 879 F.2d at 1312.* And most important, because it relates to the instant case, the courts have held that the participation clause applies even where a witness (like the Plaintiff, Twisdale) does not testify or participate for the purpose of assisting the claimant. See *Merritt, 120 F.3d at 1185-89.* As explained in *Glover v. South Carolina Law Enforcement Division*:

> This conclusion [that "participating" employees receive unequivocal retaliation protection] is consistent with the purpose of the participation clause: Maintaining unfettered access to statutory remedial mechanisms. Section *704(a)'s* protections ensure not only that employers cannot intimidate their employees into foregoing the Title VII grievance process, but also that investigators will have access to the unchilled testimony of witnesses. "Activities under the participation clause are essential to the machinery set up by Title VII." *Laughlin, 149 F.3d at 259 n.4* (internal quotations marks omitted). If a witness in a Title VII proceeding were secure from retaliation only when her testimony met some slippery reasonableness standard, she would surely be less forthcoming. It follows that the application vel non of the participation clause should not turn on the substance of the testimony. See *Merritt, 120 F.3d at 1185-89* (participation clause applies even where witness does not testify for the purpose of assisting the Claimant); see also *Ross, 759 F.2d at 357 n.1* (antiretaliation provision

> applies even where underlying discrimination claim was not meritorious). "A protected activity acquires a precarious status if innocent employees can be discharged while engaging in it, even though the employer acts in good faith." (*Pettway, 411 F.2d at 1005*).

The most compelling legal analysis that is on point with the instant case was written by the Eleventh Circuit in the case of *Meritt v. Dillard Paper Co., 120 F.3d (11th Cir. 1997)*. As in the instant case the Appellant employee testified as to his involvement on the alleged charges against him, the manager. The Appellee (employer) settled with the complainant and then took disciplinary action against those who they believe had caused the sexual harassment. The Appellant was fired and subsequently filed a Title VII claim of retaliation because of his participation. The District Court used a similar reasoning as the Seventh Circuit did on the instant case and dismissed it. The Eleventh Circuit, however, reversed the decision with a comprehensive analysis. Excerpts from Judge Carnes opinion:

> In construing a statute we must begin, and often should end as well, with the language of the statute itself. See *Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 409, 113 S. Ct. 2151, 2157, 124 L.Ed.2d 368 (1992)*; see also *Bailey v. United States, 516 U.S. 137; 116 S. Ct. 501, 506, 133 L.Ed. 2d 472 (1995)*. As the Supreme Court has admonished, "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54, 112 S. Ct. 1146, 1149, 117 L.Ed. 2d 391 (1992)*; see also, e.g., *United States v. Labonte, 520 U.S.*

751; 117 S. Ct. 1673, 1677, 137 L. Ed. 2d 1001 (1997) ("We do not start from the premise that this language is imprecise. Instead, we assume that in drafting this legislation, Congress said what it meant."). "When the words of a statute are unambiguous, then, this first canon [of statutory construction] is also the last: judicial inquiry is complete." *Connecticut Nat'l Bank v. Germain, 503 U.S. at 254, 112 S. Ct. at 1149* (internal quotation marks omitted).

The anti-retaliation provision is straightforward and expansively written. Congress chose the language "testified" and "participated in any manner" to express its intent about the activity to be protected against retaliation. The word "testified" is not preceded or followed by any restrictive language that limits its reach. As to "participated in any manner, "the adjective "any" is not ambiguous; it has a well established meaning. Earlier this year, the Supreme Court explained, "Read naturally, the word "any' has expansive meaning, that is, "one or some indiscriminately of whatever kind.' "*United States v. Gonzales, 520 U.S. 1; 117 S. Ct. 1032, 1035, 137 L.Ed. 2d 132 (1997)* (citation omitted). Here, as in Gonzales, "Congress did not add any language limiting the breath of that word," so "any" means all. See id.

... The district court thought that Title VII's anti-retaliation provision does not cover an involuntary witness who is opposed to the claimant's position, because that provision

> was designed to protect those who "aid" and "assist" Title VII claimants. There are two insurmountable problems with that reasoning. First, whatever design might be perceived behind the provision, the actual design put forward through the language of the provision does not require that the testimony or other participation aid or assist the claimant. Instead of making assistance to the claimant a prerequisite for protection against retaliation, Congress chose to make assistance only one of four alternative means of qualifying for such protection. Congress prohibited retaliation against anyone who "made a charge, testified, assisted, or participated in any manner." *42 U.S.C. 2000e-3(a)* (emphasis added). Under the plain language of the provision, those who testify or otherwise participate in a Title VII proceeding are protected from retaliation for having done so, even if it turns out they were not of any assistance to the Title VII claimant.

In the instant case the court below raised a concern that a literal interpretation of the protection statute could not promote the policy of Title VII. The district court in *Meritt v. Dillard Paper Co.,* also put forth two arguments, one similar to the Seventh Circuit's. Both were dismissed by the Eleventh Circuit. The first argument cites the consequences of such a broad interpretation. Arguing, same as the Seventh Circuit, that it would place employers on dangerous ground when disciplining employees who have engaged in a Title VII violation discovered through participation in a EEOC investigation. The second argument is that a broad interpretation would inundate the federal judiciary with lawsuits. The Eleventh Circuit's response to the first argument:

> "... such policy concerns cannot alter our interpretation and application of clear statutory language. ... This is not a case where the absurd results principle is operative, because we cannot say that application of the plain meaning of the anti-retaliation provision's language produces an absurd result."

Response to the second argument:

> "For good or ill, Congress has decided that individuals who have "testified, assisted, or participated in any manner" in a Title VII proceeding are entitled to protection from retaliation because of that participation, and we must make room on our dockets for any resulting cases."

Now, regarding the assistance Twisdale provided during the investigation. The undisputed material facts clearly document Twisdale's efforts to resolve the Complaint. And as a supervisor it was his responsibility to do just that. This assistance as it relates to Section *2000e-3(a)* would also protect him. The Seventh Circuit is silent in this matter rather focusing on Twisdale's participation in providing testimony. Twisdale's efforts in providing testimony and his attempt to resolve the complaint can be labeled nothing but assistance. Removing this protection from supervisors, EEO officials, Labor Relation's officials, innocent witnesses, etc. would only create a greater number of complaints reaching the court system because there would be fewer resolutions during the administrative stages.

II. FLAWED HYPOTHETICAL

The court below used a hypothetical example to illustrate its legal position. It stated, supposing Twisdale after participating in an investigation and opposing the charge of discrimination on another employee was fired because he was a racist and a sexist. The court than claims Twisdale would then be entitled to reinstatement under a literal reading of the statute. This according to the Seventh Circuit would be a "perverse" interpretation.

This example when further scrutinized presents several flaws. First, this statute alone is insufficient for reinstatement. Yes, Twisdale would have established a prima facie case by showing he was engaged in a protected activity, that he suffered an adverse employment action and that the two were causally related. See *Ross v. Communications Satellite Corp., 759 F.2d 355, 365 (4th Cir. 1985).* However, he would not automatically be reinstated as claimed by the court. Twisdale would still have to show that the adverse action taken against him was for non legitimate business purposes. The burden of showing pretext is on the Plaintiff. Second, it would leave vulnerable employees that are falsely accused of discrimination and therefore unprotected by the statute via their participation. For example, an innocent employee could be drawn into a Title VII claim through a false accusation of discrimination. The employer could use the results of that investigation to initiate an adverse action against the innocent employee. Title VII law should not be a single edge sword. It must cut both ways to ensure the protection of all. See *Meritt v. Dillard Paper Co.*, Third, and most important is the effect on witness testimony. Why would any employee or supervisor be forthcoming and cooperate not knowing if they will be offered protection under *42 U.S.C. 2000e-3(a).*

It is submitted that this hypothetical, which is the basis of the Seventh Circuit's decision is flawed. The outcome of this example would not produce the desired results as intended by Congress.

III. PLAINTIFF STILL BECOMES "PROTECTED" WHEN HE FILES HIS EEO COMPLAINT

In the event the Seventh Circuit's interpretation of *42 U.S.C. 2000e-3(a)* is deemed correct, the Plaintiff would have become protected when he filed his first complaint on May 11, 1998. Accordingly, all alleged acts of harassment subsequent to that date would be considered as retaliation. These acts would include removal of the counseling memorandum, the criminal investigation, removal of the Disclosure Office and related programs and responsibilities denied developmental acting assignments and treatment for the colitis condition. The Seventh Circuit never considered the Plaintiff's EEO complaint filings in its decision.

IV. CONCLUSION

For the foregoing reasons, the judgement of the Seventh Circuit should be reversed and the case remanded for trial.

INTRODUCTION AND SUMMARY OF ARGUMENT 2

What makes this case unique is the embedded issue that subsequent "rewards" experienced by the plaintiff after a series of harassing actions "cancel", according to the court below, "in any objective assessment" and, "any unpleasantness" suffered. So what the Seventh Circuit has said is if a man should break another mans arm deliberately and receives joy in watching the suffering but then pays for the doctors' bills, all should be forgiven and forgotten. The

injured man was made whole because of the paid medical bills or any other subsequent compensating act.

This reasoning leaves no room for accountability, discouragement of such behavior, and restitution for the suffering. If such actions were to be allowed then employers could engage in disparate treatment as long as the employee could withstand the harassment long enough to enjoy an employer offered compensation or "reward". And who is to say what qualifies as compensation or "rewards". A cycle of harassment could continue with no recourse. Endorsement of such a policy would not serve the interest of Title VII. What if an employee after suffering a hostile work environment is then promoted. Does the promotion negate the suffering? The High Court has already decided it does not. In *Burlington Industries* "Ellerth refused all of Slowik's advances, yet suffered no tangible retaliation and was, in fact, promoted once." This is no different from the Plaintiff's case.

Just as interesting, the court below has either increased the threshold for "severe or pervasive" to an impossible level inconsistent with *Harris v. Forklift Systems, Inc. 510 U.S. (1993)* or failed to truly consider all the facts in the light most favorable to the Plaintiff. Several of these acts of harassment were specifically engineered to result in the Plaintiff's incarceration or termination.

The Plaintiff endured 10 objective acts of harassment during a 26 month period that created an unbearable work environment that caused him to seek other employment both outside the IRS and within the organization as a means for escape. The Plaintiff, a 20 year veteran of the IRS with a family to support had no other option but to endure the harassment. All of these actions when viewed in their totality altered the Plaintiff's "terms conditions, or privileges of employment" *(42 U.S.C. 2000e-2(a)(1).*

There should be no distinction between the pressures brought to bear against the Plaintiff in this case as the same pressures placed on an employee for sexual favors.

ARGUMENT

THE SEVENTH CIRCUIT ERRED IN INTERPRETING AND APPLYING 42 U.S.C. 2000e-2(a)(1)

I. LEGAL GENESIS AND STANDARD FOR HOSTILE WORK ENVIRONMENT

In *Meritor v. Vinson 477 U.S. 57 (1986)* the Supreme Court held that a hostile work environment is one in which the workplace is permeated with "discriminatory intimidation, ridicule, and insult" so severe or pervasive "that it alters the conditions of the victim's employment and creates an abusive working environment." The Court affirmed this standard in *Harris v. Forklift Systems, Inc. 510 U.S. (1993),* promulgating a two-part test to determine whether a hostile work environment is presented under Title VII. First the complained-of conduct must create "an environment that a reasonable person would find hostile or abusive." Second, the victim must "subjectively perceive the environment to be abusive" in order to satisfy the requirement that the conduct "actually altered the conditions of the victim's employment."

In assessing whether a hostile environment exist, the facts must be examined in their totality. The frequency and severity of the discriminatory conduct, whether the conduct was "physically threatening or humiliating, or a mere offensive utterance," and whether the conduct "unreasonably interfered with an employee's work performance" are among the factors to be weighted. In formulating this approach, the

Court's intention was to create "a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury." *Id.* In *Harris* the Court observed that:

> Title VII comes into play before the harassing conduct leads to a nervous breakdown. A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers.

The Supreme Court further defined the contours of hostile work environment doctrine in *Oncale v. Sundowner Offshore Services, Inc. 523 U.S. 75 (1998).* It held the plaintiff could maintain a Title VII claim based on same-sex harassment. In doing so, the Court reiterated it's holding in *Harris* that "the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.'"

II. AFFIRMATION OF THE HOSTILE WORK ENVIRONMENT STANDARD

In two landmark decisions the Supreme Court outlined the circumstances in which employers may be liable for sexual harassment by superiors. *Burlington Indus. V. Ellerth, 524 U.S. 765 (1998)* and *Faragher v. City of Boca Raton, 524 U.S. 775 (1998).* It also affirmed its earlier decision in *Harris v. Forkliff Systems Inc., 510 U.S. 17 (1993),* for the standards necessary to establish a hostile work environment. The Court ensured that the *Harris* standards for establishing actionable sexual harassment are sufficiently demanding to prevent Title VII from becoming a "general civility code."

Regarding this concern, the Court specifically stated that "properly applied, [lower Courts] will filter out complaints attacking the ordinary tribulations of the work place such as sporadic use of language, gender related jokes and occasional teasing." *Faragher*. See also, e.g., *Carrero v. New York City Housing Authority, 890 F.2d 569, 577-578 (2d Cir. 1989)*; *Moylan v. Maries County, 792 F.2d 746, 749-750 (8th Cir. 1986)*; see also *I Lindeman & Grossman, 805-807, n.290* (noting cases granting summary judgment for employer because the alleged harassment was not sufficiently severe or pervasive).

In *Burlington* the court was very clear in accepting unfulfilled threats as a condition showing severe or pervasive conduct sufficient to establish a hostile work environment. It stated

> For any sexual harassment preceding the employment decision to be actionable, however, the conduct must be severe or pervasive. Because Ellerth's claim involves only unfulfilled threats, it should be categorized as a hostile work environment claim which requires a showing of severe or pervasive conduct.... For purposes of this case, we accept the District Court's finding that the alleged conduct was severe or pervasive.... The case before us involves numerous alleged threats, and we express no opinion as to whether a single unfulfilled threat is sufficient to constitute discrimination in the terms or conditions of employment.

In the instant case the Plaintiff not only was subjected to unfulfilled threats, but several of them were actually executed. Although the officials did not succeed in their

desired outcome, the execution of the threats constitutes threats in themselves. This should be no different from sexual harassment threats where the employee did not succumb.

III. CLEAR EVIDENCE OF A SEVERE SUBJECTIVE AND OBJECTIVE HOSTILE WORK ENVIRONMENT

It is the Plaintiff's position the acts of harassment caused against him substantially exceed the High Court's standard for a hostile work environment. Sufficient evidence has been submitted to allow a reasonable jury to conclude that the Plaintiff was subjected to a subjective and objective hostile work environment and that the harassment were both sever and pervasive. The February 10, 1998 interrogation by Rogers, an IRS executive 3 levels above Twisdale was unprecedented. Rogers was unable to provide any similar examples where he summoned employees three levels below him for questioning. It can be inferred that Twisdale was actually admonished, humiliated and intimidated by Rogers in an attempt to stop him from investigating another African-American. Interesting, the very next day Twisdale was called into a meeting with his immediate supervisor Galye Morin, the Assistant District Director, during which time Morin clarified that Twisdale was to continue with the investigation on B. Madison. A need for clarification would not have existed without Rogers' attempt at intimidating Twisdale.

Then Twisdale was told all his personnel in his Disclosure Office would be reassigned. This is the same office B. Madison worked in. Rogers admits he had no problems with the Disclosure Office employees. He therefore had no business reason for such a decision. The proposed wholesale reassignment of the entire Office supervised by Twisdale was a threat.

Shortly after the threat Rogers ordered an internal audit of the Disclosure Office claiming Privacy Act violations in spite of the completion of a recent review which revealed no critical issues and was complementary of Twisdale. This was the first and only audit ever ordered by Rogers. Rogers acknowledges the recent Regional review of the disclosure office which resulted in no findings. Rogers admits to having no specific information about the Office that would have prompted him to request the audit. Rogers never discussed his intentions to request an audit with Twisdale's supervisor. Rogers never studied the previous Regional Review Report on the Office. And Rogers could not produce any evidence of the alleged Privacy Act violation. Finally, Rogers admits that he made an oral request directly to the Regional Inspector for the audit which is a violation of IRS procedures *(Internal Revenue Manual – Part X – Inspection (10)200 SubSection (10)213 Determining Audit Coverage, Last amended 8/20/1986))* which required Regional Commissioner approval first. Results of the audit vindicated Twisdale of Rogers' allegations. If Rogers had no business purpose for the audit then it can only be labeled a "witch hunt" or another threat. If the results were any different, Twisdale would have surely faced an adverse action at the design of Rogers.

These three instances happening in a very rapid sequence and all having Rogers and B. Madison in common clearly signaled to Twisdale that he was being targeted for harassment because he was white. This caused him to file an EEO complaint outlining all his fears and requesting the harassment to stop. The filing of a complaint would surely qualify as an event where an employee "subjectively perceives the environment to be abusive." See *Harris v. Forklift Systems.* These same instances would also qualify as objective evidence.

As if the intimidation, threat and unauthorized audit with no business purpose were not enough, the harassment continued. Twisdale soon was subjected to another review. This time they had chosen his Problem Resolution Program. This review like the Internal Audit was not routine but rather the exception and unprecedented. Rogers could not provide another example of this type of review, clearly indicating disparate treatment just like the Internal Audit. And just like the Internal Audit this review was another "witch hunt" or threat. Twisdale filed a rebuttal reporting disregarded directives, insubordination, untruthful statements, inaccuracies and protocol violations. The review and its results caused Twisdale to file another EEO Complaint claiming retaliation and harassment and asking for it to stop. The review would clearly qualify as an objective act and the subsequent filing of the second EEO complaint listing his concerns and asking for help would qualify as subjective perceptions.

Shortly after Murphy's arrival she took action to grant B. Madison's request to have the counseling memorandum issued by Twisdale during his investigation for lying removed. It is IRS policy to keep such memorandums on file for two years. Murphy did not dispute the fact B. Madison lied. She simply had the memorandum removed. Such a decision with the common link of B. Madison and Race, without a business reason to justify it can only be viewed as a discriminatory act against Twisdale, designed to undercut his authority and ability to function as a leader.

Then Twisdale learned of an allegation that he stole official IRS records, caused a serious breach of security, abused his managerial authority and made an unauthorized disclosure. The allegation was made by B. Madison's husband, E. Madison. This caused the IRS Inspection Service to conduct a criminal investigation on Twisdale. Once again Twisdale was vindicated of any wrong doing just

like the Internal Audit and Problem Resolution Program Review. The implications and potential outcome of a criminal investigation is one of the most serious matters for any employee or person to have to endure. How the Seventh Circuit can not consider a criminal investigation as sever is beyond the Plaintiff. The outcome of such an investigation could have resulted in his termination or worse, incarceration. In any event Twisdale must now live out the balance of his career with an investigative file of his alleged wrong doing. The court below never mentioned this act of harassment in its decision.

At this same time Twisdale learns he is being passed over for developmental acting assignments and that Murphy is selecting less qualified employees and even employees subordinate in grade over him to act in her place. In fact, it turns out that he was passed over 156 times in favor of 10 employees that did not possess the same grade, experience and promotability as him. Twisdale now files a third EEO complaint again asking the organization for help to bring this harassment to an end. The removal of the counseling memorandum, the criminal investigation and denied acting assignments would clearly qualify as objective acts and the filing of the EEO complaint a subjective act.

Then on August 2, 1999 Twisdale felt compelled to write a memorandum to Murphy titled "Continued Acts of Retaliation in which he alleged among other things harassment from other employees. He specifically stated: "It is my duty to inform you that these acts of retaliation have had a severe impact to my job attitude, performance, health and personal life." Because of this memorandum Twisdale is removed from the only acting assignment Murphy provided him. Twisdale again files a fourth EEO Complaint reporting the harassment and asking it to stop.

Finally, Twisdale was treated for colitis on August 26, 1998; November 3, 1998 and January 29, 1999. His colitis was caused to flare up because of the constant hostile work environment he had to endure. The Court below makes no mention of this in its decision.

In *Harris v. Forklift Systems* the Supreme Court stated that

> [w]hether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance

Clearly these acts of harassment qualify as numerous, frequent and objective. Ten of which were documented over a 26 month period.

The Plaintoff's 1) filings of the four EEO complaints, 2) feelings of fear and anxiety because of potential adverse actions that could have resulted form either the internal audit, review or criminal investigation, 3) fear of the possibility of imprisonment or fines from the criminal investigation, 4) reduced responsibilities from the reassigned Disclosure Office, 5) humiliation in the denied acting assignments when less qualified employees were given the opportunity, 6) humiliation in the public internal audit and review of his programs implying to employees that he was incompetent and distrusted, 7) stress-related medical problems and 8) constant interference from these audits, reviews and investigations all of which impacted on his ability to perform at his best. Justice Ginsburg noted in her

concurring opinion in *Harris*, to show unreasonable interference with a plaintiff's work performance,

> "'the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.' It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to 'make it more difficult to do the job.'" *510 U.S. 17, 25, 114 S.Ct. 367, 126 L.Ed. 2d 295 (Ginsburg, J., concurring) (quoting Davis v. Monsanto Chem. Co., 858 F.2d 345, 349 (6th Cir. 1988)).*

When all of the harassing events directed against the Plaintiff are viewed in their totality, the evidence is overwhelming and sufficient to establish severity and show a subjective and objective hostile work environment. These actions must fall into that "middle path" standard as defined in *Harris*. All of these actions when viewed in their totality altered the Plaintiff's "terms conditions, or privileges of employment" *(42 U.S.C. 2000e-2(a)(1).*

Harassment when conducted at such a high level in an organization can not be compared to the more common harassment such as name calling, unwanted sexual advances, derogatory postings of racial insults, etc. Rather experienced leaders who choose to engage in harassment are far more sophisticated and less likely to use overt and simple tactics. They will simply bring the power of the organization to bear on the victim in a more strategic manner. The Plaintiff's case is a study of racial harassment conducted by an educated and powerful employer.

The Plaintiff does not dispute the need for audits and reviews. He has experienced many in his career. But when an audit, review and a criminal investigation are all initiated by African-American supervisors against the Plaintiff and no one else and when there is no business purpose for them, and when they are unprecedented in nature then only one explanation is possible. If the Plaintiff was hypersensitive as implied by the court below he would never have established a 20 plus career in IRS management. Rather the Plaintiff's experience and instincts triggered an alarm that these actions were highly suspicious. IRS employees are trained to report ethical and conduct violations. The Plaintiff did what he was trained and expected to do.

The question comes down to this; do these acts in there totality represent a business environment a "reasonable person" would want to work in? The answer must be no.

IV. BONUSES, REWARDS AND PROMOTION

The perceived "rewards" are disputed by the Plaintiff as rewards. However, the Seventh Circuit still considered them. The task force and committees the Plaintiff participated on were his job responsibilities. The Plaintiff possessed specialized skills which made him a desirable commodity. If he had not agreed or volunteered for these assignments it would have reflected poorly on him and surely impacted his evaluation. Besides it is not the Plaintiff's nature to succumb to harassment. He had to press on and look for opportunities that could take him away from the hostile environment. His work ethic would not permit self pity. He also had faith that the system to address the alleged wrong doings would work. That is why he filed the EEO Complaints. And the Plaintiff is a 20 year veteran who has invested his entire career and life in the IRS. He has a wife and 4 children that depend on him for support, health care, education, etc. He simply had to endure the harassment

as a pet dog, dependent on its owner for food, would endure mistreatment. As for the bonuses received, these were automatic with his annual evaluation. The Plaintiff during his career as a second level supervisor performed at an exceptional level. All supervisors performing at that level received an automatic bonus. In regards to the promotion; it was received through a competitive process that was not controlled by the harassing officials in the Indiana District. And as stated earlier in *Burlington* an employee's promotion did not deflect from or cancel out the harassment.

V. CONCLUSION

For the foregoing reasons, the judgement of the Seventh Circuit should be reversed and the case remanded for trial.

APPENDIX

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REPRODUCED AND REFORMATTED SEVENTH CIRCUIT'S OPINION WITH NAMES OF THE JUDGES..... A-1

REPRODUCED AND REFORMATTED ORDER/JUDGEMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT..... B-1

APPENDIX A-1

In The
United States Court of Appeals
For the Seventh Circuit

No. 02-1736

James B. Twisdale — Plaintiff-Appellant

v.

John W. Snow
Secretary of the Treasury, — Defendant-Appellee

Appeal from the United States District Court
For the Southern District of Indiana, Indianapolis Division
No.00-C-860-Y/F-Richard L. Young, Judge.

Argued December 10, 2002 – Decided April 10, 2003

JUDGES: Before FLAUM, Chief Judge, and POSNER and WILLIAMS, Circuit Judges.

OPINIONBY: POSNER

Opinion: POSNER, Circuit Judge. James Twisdale, an employee of the Internal Revenue Service, brought suit against his employer under Title VII of the Civil Rights Act of 1964, charging that black supervisors harassed him because he is white and retaliated against him for his opposing a black employee. The district court granted summary judgment for the defendant.

The pertinent facts, stripped to bedrock and viewed as favorably to Twisdale as the record will permit (which is not very favorable), are as follows. In 1997 Twisdale was chief of the IRS's Quality Measurement Branch in Indianapolis; his pay grade was GS-14. One of the employees whom he supervised was a black woman named Barry Madison. She

filed a charge of employment discrimination on grounds of race and sex with the IRS's equal employment office. The charge was investigated and Twisdale participated in the investigation in various ways, for example by giving information to the EEO investigator. [*2] Twisdale was skeptical of Madison's claim. Later he was instructed by his superiors to investigate an alleged ethical violation by Madison. He did so and determined that she had indeed committed an ethical violation, though a minor one, and he issued a reprimand to Madison – precipitating a charge of discrimination by her against him. He claims that as a result of his opposition to Madison's claim of discrimination, as well as his reprimanding her and being white, he was subjected to various humiliations by his black supervisors. The humiliations of which he complains included audits of some of the programs that he administered, a delay in giving him "acting supervisor" assignments, which apparently were prized, and above all the removal from his purview of the Disclosure Office, which had three employees and is responsible for protecting taxpayers' privacy, and of the Problem Resolution Program, a program for dealing with taxpayer complaints. Madison's original complaint of discrimination was eventually resolved in her favor, by there was never a determination that Twisdale had discriminated against her, although the IRS agreed to remove his reprimand of her from her personnel file. [*3]

The period of harassment is alleged to have continued through August of 1999. Yet during this period Twisdale received generous performance-related bonuses and coveted assignments to IRS national task forces, though he argues that he received these assignments because the removal of the Disclosure Office and the Problem Resolution Program from his supervision left him with unwanted time on his hands. The following year he was promoted to a more responsible job at the next-higher pay level, GS-15, and while the promotion required him to relocate to West

Virginia he had made clear in applying for the promotion that he was willing to move and indeed he had listed 27 cities, though none in West Virginia, to which he would be happy to transfer. He accepted the transfer to West Virginia and remains employed by the IRS there, in a position as we said of greater responsibility than he had in Indianapolis.

There is one legal issue that is both clean and novel, and although the government reserved it rather than arguing it as an alternative ground for upholding the district court's decision, it was thoroughly ventilated at the argument of the appeal and being a pure issue of law we can with [*4] propriety decide it despite its not having been briefed. See Singleton v. Wulff, 428 U.S. 106, 121, 49 L. Ed. 2d 826, 96 S. Ct. 2868 (1976); Sestric v. Clark, 765 f.2d655, 657 (7th Cir. 1985); Krumme v. WestPoint Stevens Inc., 238 F.3d 133, 142 (2d Cir. 2000); cf. Hill v. American General Finance, Inc., 218 F.3d 639, 642, 645 (7th Cir. 2000).

[HN1] The provision of Title VII that concerns retaliation forbids an employer "to discriminate against any of his employees ... because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under "the statute, 42 U.S.C. 2000e-3(a). (The retaliation provisions of the other principal federal employment discrimination statutes are materially identical. See 29 U.S.C. 623(d) (Age Discrimination in Employment Act); 29 U.S.C. 794(d) (Rehabilitation Act); 42 U.S.C. 12203(a) (Americans with Disabilities Act).) Read literally, the provision protects even an employee who like Twisdale participates in an investigation on the [*5[side of the employer rather than on the side of the employee who made the charge of discrimination. Suppose hypothetically that Twisdale had opposed Barry Madison's charge of race and sex discrimination because he is a racist and a sexist and that he had been fired for having opposed her her charge. On his view of the scope of the retaliation provision, he would

be entitled to reinstatement. He is claiming in effect the absolute immunity that prosecutors and judges enjoy when performing prosecutorial and judicial functions, respectively.

How such an interpretation could promote the policy of Title VII is beyond us. [HN2.] The statute has the limited purpose of preventing certain forms of discrimination. The retaliation provision backs up this central thrust by protecting employees who invoke the statutory machinery for rectifying violations. We cannot find any hints in the case law, the legislative history, interpretations by government agencies, or scholarly commentary of any purpose of protecting employees whose resistance to charges of discrimination made by their coworkers provokes the employer's ire. Until this case, so far as we can determine, everyone concerned in the administration of[*6.] Title VII and cognate federal antidiscrimination statutes had assumed that the retaliation provision was for the protection of the discriminated against, and not their opponents. E.g., Robinson v. Shell Oil Co., 519 U.S. 337, 347, 136 L. Ed. 2d 808, 117 S. Ct. 843 (1997); Heuer v. Weil-McLain, 203 F.3d 1021, 1023 (7th Cir. 2000); Petersen v. Utal Dept of Corrections, 301 F.3d 1182, 1189 (10th Cir. 2002); Castellano v. City of New York, 142 F.3d 58, 69 (2d Cir. 1998). As in the hypothetical case we put, the employer would be sitting on a razor's edge if it could not discipline employees whose opposition to discrimination charges placed the employer in jeopardy of violating an employee's statutory rights.

Twisdale did participate in an investigation of a discrimination charge, and so comes within the literal terms of section 2000e-3(a). But awkwardly, since the first act protected by the section is making a charge, which suggests that the subsequent acts listed – testifying, assisting, and participating – refer to acts in support of the charge. He would be on solider ground if instead of "because he has

made a charge" [*7.] the statutory words were "because he has made our opposed a charge." In effect he asks us to insert the term that we have italicized. But, as we have explained, this would merely gum up the statutory works. [HN3} Perverse and absurd statutory interpretations are not to be adopted in the name of literalism; they merely show the limitations of literalism as a mode of interpretation.

Twisdale has another string to his bow, however; for remember that he is arguing that he was harassed on account of his race and not just on account of his participation in the investigation of Barry Madison's charge of discrimination. (His further charge that he was harassed for reprimanding Madison seems to be a variant of his race charge. If not, it would have no purchase in the statute.) That claim fails too, because the harassment of which he complains was not severe enough to have altered the terms or conditions of his employment. [HN4] Title VII does not create a remedy against harassment as such; the harassment must – this explicit in the statute – amount to discrimination "with respect to [the employee's] compensation, terms conditions or privileges of employment. 42 U.S.C. 2000e-2 (a)(1)[*8]. The cases paraphrase this requirement either as a tangible employment action, 'that is, 'a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits,; or as a 'materially adverse employment action.''' Hernreiter v. Chicago Housing Authority, 315 F.3d 742. 743-44 (7th Cir. 2002) (case citations omitted); see also Clark County School Dist v. Breeden, 532 U.S. 268, 270-71, 149 L. Ed. 2d 509, 121 S. Ct. 1508 (2001) (per curiam); Allen v. Chicago Transit Authority, 317 F.3d 696, 701 (7th Cir. 2003); Silk v. City of Chicago, 194 F.3d 788, 807-08 (7th Cir. 1999); Gu v. Boston Police Dept., 312 F.3d 6, 14 (1st Cir. 2002).

To determine whether this requirement has been satisfied requires consideration of the employee's total workplace environment; and here the performance bonuses, the task force appointments, and the promotion to a more responsible and better-paying job go quite far enough to cancel, in any objective assessment, any unpleasantness that Twisdale [*9] might have experienced because his programs were audited and one program and three employees were removed from his purview and he didn't get as many acting-supervisor assignments as he would have liked. In any event, that unpleasantness, even if not balanced by rewards both tangible and intangible, falls short of the level of severity required to trigger judicial intervention under Title VII. Twisdale emphasizes the diminution of his responsibilities; and [HN5] it is true if paradoxical that lightening a worker's load can constitute actionable harassment, Dahm v. Flynn, 60 F3d 253, 256-57 (7th Cir. 1994) – but only if by depriving him of the opportunity to maintain and improve his skills it impedes his career see Grayson v. City of Chicago, 317 F.3d 745, 750 (7th Cir. 2003); Hernreiter V. Chicago Housing Authority, supra, 315 F.3d at 744; Freedman v. MCI Telecommunications Corp., 347 U.S. App. D.C. 112, 255 F.3d 840, 847-48 (D.C. Cir. 2001), which did not happen here, as indicated by his promotion. Grayson v. City of Chicago, supra, 317 F3d at 750. The statute does not protect the hypersensitive[*10] employee who is not deliberately targeted by the employer from the irritations endemic to the employment relation. Pryor v. Seyfarth, Shaw, Fairweather & Geraldson, 212 F.3d 976, 978 (7th Cir. 2000); Andrews v. City of Philadelphia, 895 F.2d 1469, 1483 (3d Cir. 1990).

APPENDIX B-1

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

JUDGEMENT – WITH ORAL ARGUMENT

Date: April 10, 2003

Before: Honorable Joel M. Flaum, Chief Judge
Honorable Richard A. Posner, Circuit Judge
Honorable AnnClaire Williams, Circuit Judge

No. 02-1736

James B. Twisdale
Plaintiff – Appellant

V.

John W. Snow, Secretary of the United States Department of the Treasury,
Defendant – Appellee

Appeal from the United States District Court for the Southern District of Indiana, Indanapolis Division No. 00 C 860, Richard L. Young, Judge

The Judgement of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

(1061-110393)

(2)

Supreme Court, U.S.
FILED

03 310 JUL 3 2003

OFFICE OF THE CLERK

No. 02-1736

In The

Supreme Court of the United States

JAMES B. TWISDALE,

Petitioner

v.

JOHN W. SNOW, Secretary of the Treasury,

Respondent

On Writ of Certiorari to the
Untied States Court of Appeals
For the Seventh Circuit

SUPPLEMENTAL APPENDIX

JAMES B. TWISDALE
103 E. MCCLURE DR.
SCOTT DEPOT, WV 25560
304-757-4738
August 23, 2003

22pp

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JAMES B. TWISDALE, Plaintiff, —	)	
	)	IP 00-860-C-Y/F
vs.	)	
PAUL H. O'NEILL, Secretary of the United States Department of the Treasury, Defendant.	)	

ENTRY ON DEFENDANTS MOTION FOR SUMMARY JUDGMENT

Plaintiff James B. Twisdale ("Twisdale") has been an employee of the Internal Revenue Service ("IRS") since 1981. He alleges in his Complaint that has been the subject of employment discrimination; in particular, he alleges a hostile working environment and retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 200e et seq. The Defendant herein, Paul H. O'Neill, Secretary of the United States Department of the Treasury ("Defendant"), now moves for summary judgment. For the reasons set forth below, the court GRANTS said motion.

I. Summary Judgment Standard

A party is entitled to summary judgment "if the Pleadings, answers to Interrogatories, and admissions on file, together

with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56©. The record and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party. National Soffit & Escutcheons, Inc. v. Superior Sys., Inc., 98 F.3d 262, 264 (7th Cir.1996).

The moving party bears the burden of demonstrating the absence of a triable issue. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The burden may be met by demonstrating "that there is an absence of evidence to support the nonmoving party's case." Id. At 325. If the moving party meets its burden, the adverse party "may not rest upon the mere allegations or denials of the adverse party's pleading," but must present specific facts to show that there is a genuine issue of material fact. Fed. R. Civ. P. 56(e); see also National Soffit, 98 F.3d at 265 (citing Hughes v. Joliet Correctional Center, 931 F.2d 425, 428 (7th Cir. 1991)).

II. Facts

A. Twisdale's Initial Employment with the IRS in Indianapolis

1. Twisdale, a white male, began working for the IRS in 1981, and in 1994 the IRS laterally promoted Twisdale to a position in Indianapolis as a Chief of Examination Branch II. (Deposition of James B. Twisdale ("Twisdale Dep."), Vol. I, at 25).
2. In this position, Twisdale was in charge of a field branch, and would conduct operation reviews that included reviewing records, assessing managers' success in certain programs, and providing information to a regional or national IRS office. (Twisdale Dep., Vol. I, at 49).

3. Barry Whaley ("Whaley"), a white male, was Twisdale's supervisor during this time. (Twisdale Dep., Vol. 1, at 45).
4. In 1996, due to a reorganization, Twisdale was laterally reassigned to Chief, Quality Measurement Branch ("QMB") in Indianapolis. (Twisdale Dep., Vol. I, at 46, 58).
5. As a QMB Chief, Twisdale's responsibilities included reviewing cases for quality and technical accuracy. (Twisdale Dep., Vol. I, at 54).
6. Whaley continued to supervise Twisdale during this time. (Twisdale Dep., Vol. I, at 54-55).
7. During January and February 1997, Twisdale took a detail assignment to review appeal cases. (Twisdale Dep., Vol. I, at 64).
8. In this position, Twisdale reviewed appeal officers' reports and recommendations regarding taxpayer appeals. In addition, he did workload reviews, provided advice to employees, and technical assistance and research. (Twisdale Dep., Vol I, at 69- 70).

B. Twisdale's Involvement with Barry Madison

9. In March of 1997, Twisdale supervised Barry Madison ("Madison"), a black female GS-11 disclosure specialist (Twisdale Dep., Vol. I, at 70, 75).
10. Madison was married to Everett Madison ("E. Madison"), a black male, who was the Chief of Collections for the IRS in Indianapolis. (Twisdale Dep., Vol. I, at 70, 78-79).
11. Twisdale believes that Madison's performance review at that time was "fully Successful," although he is not sure. (Twisdale Dep., Vol. I, at 73).
12. Following his detail to appeals, Twisdale returned to his position of QM B Chief, and upon Whaley's suggestion, Madison began working for Twisdale as a disclosure specialist. (Twisdale Dep., Vol. I, at 75-76).

13. Madison's immediate supervisor in this position was Disclosure Officer Mary Lue Graham ("Graham"). (Twisdale Dep., Vol. I, at 82).
14. On one occasion, Graham wanted to give Madison a rating less than fully satisfactory. (Twisdale Dep., Vol. I, at 84).
15. However, Twisdale felt that Madison had been reassigned to a job for which she had no training, and that the IRS had an obligation to teach her how to perform her new job. (Twisdale Dep., Vol. I, at 80-81).
16. Accordingly, Twisdale instructed Graham not to rate Madison less than fully satisfactory, even though Twisdale felt that such a rating was not an accurate assessment of her performance. (Twisdale Dep., Vol. I, at 84).
17. Twisdale is not aware of Madison ever being disciplined by the IRS or rated below "fully satisfactory." (Twisdale Dep., Vol. I, at 73, 75).
18. From February through July of 1998, Twisdale initiated approximately four to five meetings with Graham, Madison, Disclosure Assistant Vicki Reynolds ("Reynolds"), and himself to ease the tension in the disclosure group. (Twisdale Dep., Vol. I, at 98-100).
19. Twisdale would compliment Graham, Reynolds, and Madison on their work. (Twisdale Dep., Vol. I, at 100-01).
20. The IRS sent Madison to various disclosure and related training courses. (Twisdale Dep., Vol. I, at 101).
21. The IRS assigned Madison shortly after she received this training, but Twisdale is unaware of any documented performance problems with Madison after she received this training. (Twisdale Dep., Vol. I, at 101-03).
22. On November 7, 1997, Madison contacted EEO Counselor David Diffenbach ("Diffenbach") and alleged that her annual performance evaluation, which rated her at the "3" level instead of the "4" level, did not adequately reflect her accomplishments and

discriminated against her based on her sex and race. Because Twisdale was the supervisor of the Disclosure Office, he was implicitly named as an offending party. (Twisdale Dep., Vol. I, at 112-14; Ex. 21).

23. A "3" rating means the employee is meeting all her critical elements and that she is doing her job. (Deposition of Jim Rogers ("Rogers Dep.") at 154).
24. Twisdale met with Diffenbach in an effort to resolve the matter. (Twisdale Dep.,Vol. I, at 116).
25. Twisdale proposed, after cousulting with Labor Relations Specialist Elaine Rogers ("E. Rogers"), EEO Officer Deborah Greene ("Greene") and Graham, that two of Madison's performance levels be raised from "3s" to "4s" to give her back pay for her acting assignment as a disclosure officer for two weeks, and to subject her to a desk audit to see if she was performing a higher grade level of work. (Twisdale Dep., Vol. I, at 117).
26. Otis Damron ("Damron"), a white male who served as Acting Examination Division Chief, took over the negotiations and reached an EEO settlement withMadison after Twisdale was unable to do so. (Twisdale Dep., Vol. I, at 129-30).
27. District Director James Rogers ("Rogers"), a black male, agreed to sign off on a resolution which granted all of Madison's demands.
28. Rogers and wife engaged in a social relationship with the Madisons. (Twisdale Dep., Vol, I, at 126; Rogers Dep. At 62-63).
29. Rogers testified, however, that the Madisons did not ask him to interfere or intervene. (Rogers Dep. At 67).
30. Rogers does not recall making any suggestions relative to Madison's EEO settlement, although he does recall some discussion about performing a desk audit. (Rogers Dep. At 150-51).
31. Madison's EEO complaint was resolved on April 3, 1998. (Twisdale Dep., Vol I, at 131).

32. Twisdale did communicate verbally with the EEO officials. (Twisdale Dep., Vol. I, at 198-99).
33. However, Twisdale did not provide a written statement or affidavit to the EEOCounselor regarding Madison's complaint, nor did he attend any hearing. (Twisdale Dep., Vol. I, at 198).
34. On February 2, 1998, Whaley instructed Twisdale to initiate an administrative investigation as to whether Madison violated time and attendance policies, had an improper social relationship with Rogers, and engages in other misconduct. (Twisdale Dep., Vol. I, at 137-38; Ex. 23).
35. On February 10, 1998, Twisdale interviewed Madison relative to the inspector's referral. (Twisdale Dep., Vol. I, at 143-44).
36. The meeting lasted an hour to an hour and a half. (Twisdale Dep., Vol I, at 147).
37. Twisdale did not give Madison the opportunity to have another employee present during the meeting. (Twisdale Dep., Vol. I, at 147).
38. Madison was nervous, apprehensive, and defensive. (Twisdale Dep., Vol. I, at 147-49).
39. Twisdale does not recall how the meeting ended but Madison became upset. He may have terminated the meeting at that point in an effort to let her calm down. (Twisdale Dep., Vol. I, at 149).
40. Twisdale believes that Madison was likely concerned about her job when she left the meeting with him. (Twisdale Dep., Vol. I, at 158).
41. Later in the day on February 10, Rogers summoned Twisdale, Whaley, Assistant Director Gayle Morin ("Morin"), EEO Officer Greene, Labor Relations Specialist E. Rogers, and Chuck Fisher ("Fisher") to his office for a meeting relative to Madison's complaints about Twisdale. (Twisdale Dep., Vol. I, at 143-44, 151-53; Ex. 22).

42. Rogers asked Twisdale what he learned thus far in this investigation. (Twisdale Dep., Vol. I, at 161).
43. Twisdale prepared a contemporaneous memo concerning what transpired during this meeting. (Twisdale Dep., Vol. I, at 166-67; Ex. 22).
44. Rogers never instructed Twisdale to terminate his investigation of Madison even though he had the authority to do so. (Twisdale Dep., Vol. I, at 168-69).
45. In fact, on February 11, 1998, Morin called a meeting with Whaley and Twisdale and clarified that Twisdale was to continue with the investigation and take any necessary actions. (Twisdale Dep., Vol. I, at 169-70; Ex. 24).
46. Twisdale prepared a report concerning his investigation into Madison's alleged Misconduct. (Twisdale Dep., Vol. I, at 172-73; Ex. 23).
47. Twisdale stated in his report that he found no evidence of time and attendance Violations. (Ex. 23, at 1).
48. Twisdale's report also noted that while there was a perception of a conflict of interest, no conflict actually existed. (Twisdale Dep., Vol. I, at 174-75; Twisdale Dep., Vol II, at 169; Ex. 23).
49. Twisdale also examined whether a conflict existed such that Madison should not be allowed to give speeches to collection employees who worked for Madison's husband, E. Madison, but Twisdale did not believe a conflict existed. (Twisdale Dep., Vol. I, at 175-76; Twisdale Dep., Vol. II, at 169-70; Ex. 23).
50. Twisdale also investigated a yelling incident between Madison and Reynolds, and found that the arguments between the employees had subsided. (Twisdale Dep., Vol. I, at 177; Ex. 23).
51. In addition, Twisdale investigated Madison's alleged social relationship with Rogers and found no wrongdoing on Madison's part. (Twisdale Dep., Vol. I, at 178-79; Ex. 23).

52. Further, Twisdale investigated whether Madison had improperly used her husband's parking space to park in the basement of the Federal Building. (Ex. 23).
53. Based on Madison's position and rank she was not eligible to park in the basement. (Twisdale Dep., Vol. II, at 171).
54. According to Twisdale, Madison initially denied that she had parked in this parking space, but admitted doing so during a second interview with him. (Twisdale Dep., Vol. II, at 173, 215; Fxhs. 23, 25).
55. Madison denies ever telling Twisdale that she did not park in the basement in the First interview. (Twisdale Dep., Vol. I, at 180, 189; (Twisdale Dep., Vol. II, at 173, 215).
56. As a result of this incident, as well as allegedly lying to the U.S. Attorney's Office for the Northern District of Indiana, Twisdale issued Madison a counseling memorandum. (Twisdale Dep., Vol. I, at 180-81; Twisdale Dep., Vol. II, at 173-74: Ex. 25).
57. Madison experienced no loss of pay, time off work, or denial of promotion as a Result of the counseling memorandum. (Twisdale Dep., Vol. I, at 190).
58. Twisdale felt the counseling memorandum was a appropriate course of action, and did not propose more serious action. (Twisdale Dep., Vol. I, at 191-92, 194).
59. As a result of the counseling memorandum, Madison filed an agency grievance seeking $25,000 and the removal of the counseling memorandum. (Twisdale Dep., Vol. I, at 192).
60. Mary Murphy ("Murphy"), who became Chief of the Examination Division beginning in June of 1998, subsequently instructed Twisdale to remove the counseling memorandum from Madison's personnel file to resolve the grievance. (Twisdale Dep., Vol. I, at 193, 195-96).
61. Murphy is a black female. (Twisdale Dep., Vol. I, at 63).

C. Employee Reassignment From and Review of the Disclosure Office

62. Prior to becoming District Director, Rogers served as an IRS Assistant to the Deputy Commissioner, and in this capacity was very much involved in taxpayer disclosure issues. (Twisdale Dep., Vol. I, at 226-27; Ex. 29).
63. Rogers attended a meeting in January 1998 in Albuquerque, New Mexico and the issue of disclosure and agency exposure to the possibility of liability because of improper disclosure was discussed in great detail. (Twisdale Dep., Vol. I, at 228; Ex. 29).
64. Improper disclosure of taxpayer information could subject the IRS to liability. (Twisdale Dep., Vol. I, at 228-29).
65. During this training, Rogers indicated to Linda Stiff ("Stiff"), Acting Chief of Staff for the Commissioner, that he was considering inviting Internal Audit to Review his disclosure program. (Twisdale Dep., Vol. I, at 232; Ex. 30).
66. According to Twisdale's own time line of EEO events, Twisdale's first meeting with the EEO Counselor Diffenbach concerning Madison's complaint occurred on January 27, 1998. (Twisdale Dep., Vol, I, at 237; Ex. 32).
67. Accordingly, Rogers had expressed a desire to conduct an internal audit of the disclosure program prior to any involvement by Twisdale in Madison's EEO matter. (Exhs. 30, 32, 33).
68. On March 11, 1998, Damron met with Twisdale and told him that he had received a directive by Rogers to reassign three employees of the disclosure office and that Morin had instructed him to do a performance review of the disclosure office, despite the fact that a performance review had recently been completed and there were no negative findings. (Twisdale Dep., Vol. I, at 205, 210: Twisdale Dep.,Vol. II, at 165-66).

69. However, the employees were never reassigned nor was any action taken to Facilitate a possible reassignment. (Twisdale Dep., Vol. I, at 205).
70. Twisdale was not harmed by the proposed reassignment. (Twisdale Dep., Vol. 1, At 205).
71. On April 10, 1998, Twisdale was called into Damron's office, and introduced to IRS internal revenue officers, and told that the auditors were going to review the Disclosure office and check for internal controls in violation of the Privacy Act. (Twisdale Dep., Vol I, at 211-12).
72. Twisdale's role in the internal audit was to provide the auditors with information Necessary to complete the audit. (Twisdale Dep., Vol. I, at 211).
73. Twisdale asked Murphy for a copy of the internal auditors report but Murphy declined to provide the report stating that it was unnecessary because no action was required. (Twisdale Dep., Vol. I, at 235-36; Ex. 31).
74. Twisdale took the internal auditor's report to be favorable of what he was doing. (Twisdale Dep., Vol. I, at 236, 239).
75. No action was taken as a result of the internal audit report. (Twisdale Dep., Vol. I, at 238-39).

D. The PRP Review

76. The Problem Resolution Program ("PRP") intervenes on behalf of taxpayers to Resolve examination issues or collection issues. (Twisdale Dep., Vol. I, at 241).
77. On April 16, 1998, Damron told Twisdale that the PRP was to be subjected to a Review. (Twisdale Dep., Vol. I, at 241-44).
78. Damron initiated the PRP review in Twisdale's branch, which at the time was Experiencing an increase in inventory, aging of the inventory, and lack of staff. (Twisdale Dep., Vol. I, at 248-49; Ex. 35).

79. Pat Shaffner ("Shaffner"), Leisa Smith ("Smith") and Brett Brukhardt ("Burkhardt") were assigned to conduct the review of the PRP. (Twisdale Dep.,Vol. I, at 254-55; Ex. 37).
80. Shaffner, a GS-13, previously held the position of section chief of QMB. (Twisdale Dep., Vol. I, at 255-56).
81. Burkhardt, a GS-11 or 12, was an assistant taxpayer advocate and in that capacity reviewed and approved responses to PRP cases. (Twisdale Dep., Vol. I, at 255-56).
82. Smith was an examination group manager, GS-13. (Twisdale Dep., Vol. I, at 256).
83. Twisdale takes issue with the experience level of these individuals to undertake the PRP review, but admits that as a regional analyst he conducted a peer review in Los Angeles and reviewed the work of higher grade employees. (Twisdale Dep., Vol. I, at 261).
84. Moreover, as a labor relations specialist, and now as an assistant taxpayer advocate, Burkhardt has reviewed items that may have been completed by someone who was a higher grade or evaluated areas which were the ultimate responsibility of a Branch or Division Chief. (Twisdale Dep., Vol, I, at 269; Ex. 40).
85. On June 19, 1998, the team issued its report detailing its findings in connection with the PRP review, and making several recommendations to improve the PRP program. (Ex. 37).
86. On June 28, 1998, Murphy became the new Division Chief and declined to make the recommendations set forth in the PRP report. (Twisdale Dep., Vol. I, at 275-76, 279).
87. Murphy chose not to act on the PRP report because she had other ideas about the organization of the PRP. (Deposition of Mary Murphy ("Murphy Dep.") at 134).
88. Murphy did not retract the one recommendation that was in place before her arrival, that is, the placement of a PRP coordinator. (Murphy Dep. At 137-38).

89. Twisdale lost no pay, grade, or benefits as a result of the PRP report, and other than the PRP being reassigned, he lost no other duties or responsibilities. (Twisdale Dep., Vol. I, at 289-90).

E. Elevation/Reassignment of the Disclosure Office

90. In November or December 1998, Murphy elevated the Disclosure Office to a position under her immediate control. (Twisdale Dep., Vol. I, at 285).
91. Murphy and Twisdale had discussed the Disclosure Office's location within the division soon after Murphy's arrival. (Twisdale Dep., Vol. I, at 284).
92. In some districts the Disclosure Office is at the division level and in others it is at the director's staff level. Both of these levels were higher than Twisdale's level. (Twisdale Dep., Vol. I, at 284).

F. Denial of Reassignment of Field Branch Chief Position

93. Murphy denied Twisdale's request to be reassigned back to a Field Branch Chief position. (Twisdale Dep., Vol. I, at 297).
94. Such a reassignment would not have resulted in a higher salary or a higher grade. (Twisdale Dep., Vol. I, at 298).
95. Twisdale had previously left the field branch position because there was a reorganization and Whaley had asked Twisdale to be the QMB Chief. (Twisdale Dep., Vol. II, at 203).
96. Rather than simply reassign Twisdale to the position, Murphy told Twisdale that she was going to announce the position competitively. (Twisdale Dep., Vol. I, at 300).
97. Twisdale never applied for the position. (Twisdale Dep., Vol. I, at 300).

98. Jeanie Fisher ("J. Fisher"), a white female, was ultimately chosen for the Branch Chief position. (Twisdale Dep., Vol. I, at 301).

G. Madison's Referral of Twisdale to Inspection

99. On March 24, 1999, Murphy advised Twisdale that E. Madison had requested that the inspection service investigate Twisdale for allegedly accessing an unauthorized, secured area. (Twisdale Dep., Vol. I, at 95; Twisdale Dep., Vol. II, at 7-9).
100. The incident underlying this request occurred as Twisdale was about to leave the building with another employee, Brian Sweet. (Twisdale Dep., Vol. II, at 13-15).
101. On their way out of the building, Twisdale noticed that the door to the Collection office was wide open to an area which was previously an open office for taxpayers to come in to resolve collection matters. (Twisdale Dep. Vol. H, at 13-15).
102. Twisdale took a closer look and stepped inside the doorway. (Twisdale Dep., Vol II, at 12-15).
103. Twisdale noticed sealed boxes against the wall of the room but has no idea what was inside the boxes. (Twisdale Dep., Vol. II, at 16).
104. Murphy advised Twisdale on March 24 that she had received an inspection referral sheet clearing him of any wrongdoing. (Twisdale Dep., Vol. I, at 95).
105. Rogers could have disciplined Twisdale in connection with E. Madison's allegation even without the referral but he did not. Twisdale lost no pay or benefits as a result of the referral to inspection. (Twisdale Dep., Vol. II, at 20).

H. Acting Assignments

106. From February 1998 through June 1998, while Damron was his supervisor, Twisdale was never placed in the position of an Acting supervisor. (Twisdale Dep., Vol. II, at 22).

107. Twisdale never even asked for Acting assignments during this time. (Twisdale Dep., Vol. II, at 22).

108. Likewise, Twisdale never sought to be Acting when Whaley was his supervisor, from February 1994 to February 1998. (Twisdale Dep., Vol. II, at 22-23).

109. Although he did not ask for Acting assignments under Whaley, Whaley did assign him to serve in an Acting capacity five to ten times during the holidays in 1994; the longest these assignments lasted were a little over a week. (Twisdale Dep., Vol. II, at 22-23, 37-38).

110. In July 1998, Twisdale requested Acting assignments from Murphy. (Twisdale Dep., Vol. II, at 29, 190).

111. By Twisdale's account, he was assigned Acting duty four times under Murphy. (Twisdale Dep., Vol. II, at 31-32).

112. During this same time frame, Karen Turner, a white female; J. Fisher, a while Female; Shaffner, a white female; and Joe Wilson, a white male, were assigned Acting duty at a higher frequency than Twisdale. (Twisdale Dep., Vol. II, at 32).

113. On August 2-6, 1999, Twisdale was asked to act for Murphy. (Twisdale Dep.,17 Vol. II, at 56-57; Dep. Ex. 45).

114. Also on August 2, Twisdale submitted a memo to Murphy entitled, "Continued Acts of Retaliation," in which he alleged that during a meeting Shaffner and Belofsky(1) made gestures of "disbelief" after Twisdale asked a question at a Meeting that was similar to a question Shaffner had just asked. (Ex. 44 at 1).

115. In this memo. Twisdale stated, "This event and other acts of harassment that discredit my abilities and character and prevent the resolution of my issues only documents a concerted effort by Mr. Rogers, you, and

select others as continued acts of retaliation for my involvement in the EEO process. It is my duty to inform you that these acts of retaliation have had a severe impact to my job attitude, performance, health and personal life." (Ex. 44 at 2).

116. After reading Twisdale's August 2 memo, Murphy sought out Rogers's advice and they concurred that Twisdale's acting assignment should be revoked. (Murphy Dep. At 165, 168, 180).

117. On August 3, 1999, Twisdale received a voice mail from Murphy revoking the acting assignment. (Twisdale Dep., Vol. II, at 77).

118. There are no agency regulations such as the Internal Revenue Service Manual or National Agreement Between IRS, Internal Revenue Service, and National Treasury Employees Union that specifically deal with or govern the issue of the removal of Branch Chiefs from acting positions. (Twisdale Dep., Vol. II, at 67: Ex. 46).

I. Twisdale's Promotion While Being Supervised by Murphy

119. Twisdale was eligible for a promotion to a GS-15 in 1993. (Twisdale Dep., Vol. II, at 37).

120. Twisdale applied for approximately three GS-15 positions within the IRS and approximately six to eight GS-15 positions outside the IRS. (Twisdale Dep., Vol. II, at 50-51).

121. Twisdale began applying for these positions in 1998 but was never selected for any of the GS-15 positions. (Twisdale Dep., Vol. II, at 52).

122. Twisdale also applied for approximately four or five GS-14 positions within the IRS but was never selected. (Twisdale Dep., Vol. II, at 52).

123. This changed in approximately June/July 2000, when Twisdale was selected for the position of Field Compliance Territory Manager for Small Business/Self-

Employment, GS-15, a second level management position in West Virginia, (Twisdale Dep., Vol. II, at 83-84; Ex. 50).

124. This GS-15 position was a promotion, an increase in pay, and an increase in duties and responsibilities. (Twisdale Dep., Vol. II, at 123).

125. Twisdale's selection for promotion while supervised by Murphy came after Twisdale participated on five national task forces or national teams, more than with any of his other supervisors prior to Murphy. (Twisdale Dep., Vol II, at 94; Ex. 50).

126. Twisdale does not know if any other individual supervised by Murphy had participated in more task forces than he did. (Twisdale Dep., Vol. II, at 94).

127. On Friday, October 6, 2000, following his selection for promotion, Twisdale sent Murphy an electronic mail message stating in relevant part, "I would like to thank you for the recognition provided. My success could not have been possible without your support. (Twisdale Dep., Vol. II, at 107-08; Ex. 52).

128. In February 1997, while supervised by Whaley, Twisdale received a $300 performance award. (Twisdale Dep., Vol. II, at 79; Ex. 47).

129. In contrast, on October 25, 1998, Twisdale received a $1,050 performance award, which award covered a time period in which Murphy supervised Twisdale. (Twisdale Dep., Vol. II, at 80; Ex. 48).

130. In November 1999, Twisdale received a $1,250 performance award. (Ex. 49).

131. The award covered a time period in which Murphy was his supervisor. (Twisdale Dep., Vol. II, at 81; Ex. 49).

132. This may have been the biggest performance award Twisdale ever received. (Twisdale Dep., Vol. II, at 82).

III. Discussion

A. Retaliation

In order to state a prima facie case of retaliation, a plaintiff must show: "(1) that [he] engaged in statutorily protected activity; (2) that he suffered an adverse employment action; and (3) that there is a causal link between the protected activity and the adverse action." Essex v. United Parcel Service., 111 F.3d 1304, 1309 (7th Cir. 1997). A plaintiff may demonstrate such a link through evidence that the alleged adverse action followed "on the heels" of the protected activity. Dey v. Colt Constr. & Dev. Co., 28 F.3d 1446, 1458 (7th Cir. 1994).

The acts of retaliation complained of by "Twisdale include: (1) the internal audit and threatened reassignment of employees; (2) the removal of the Disclosure Office from his supervision; (3) not being assigned acting assignments; (4) attempted intimidation by the Division Chief; (5) the handling of the Madison investigation; (6) the Field Branch Chief position being filled competitively; and (7) the PRP review. Defendant contends none of these acts amounts to an adverse employment action.

An adverse employment action is a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998) (citing Crady v. Liberty Nat. Bank & Trust Co. of Ind., 993 F2d 132, 136 (7th Cir. 1993)). Thus, general unhappiness or dissatisfaction in the workplace does not constitute an actionable adverse employment action. Smart v. Ball State University, 89 F.3d 437, 441 (7th Cir. 1996) (stating "not everything that makes an employee unhappy is an actionable adverse action."). Rather, the alleged conduct must have some "tangible job consequence." Sweeney v. West, 149 F.3d 550, 556 (7th Cir. 1998).

The actions of which Twisdale complains do not amount to an adverse employment action. Indeed, the only action that even arguably affected Twisdale's job duties was the removal of the Disclosure Office from his second-level supervisory authority. However, Twisdale also had second-level supervisory authority over several other functions, as well as primary supervision over yet other functions. Thus, removal of the Disclosure Office does not constitute an adverse employment action in and of itself because supervision of the Disclosure Office was merely one facet of Twisdale's employment. Crady, 993 F.2d at 136 (holding that change in title from assistant vice-president and manager to one branch of a bank to a loan officer position at a different branch did not by itself constitute an adverse employment action). Moreover, federal courts do not sit as a "super-personnel department" to reexamine every employment related decision made by employers, such as the reassignment of a specific job duty. See, e.g., Foster v. Arthur Andersen, LLP, 168 F3d 1029, 1035 (7th Cir. 1999).

Further, the only purported evidence identified by Twisdale regarding the significance of the removal of supervision of the Disclosure Office is his own contention that there were several other districts in which the Disclosure Office was under the direct supervision of his branch-level counterparts. (Pl. Resp. at 22; Ex. C). However, his statement is not admissible evidence since he has failed to show that he has sufficient personal knowledge to testify to that fact.

Finally, Twisdale himself admits that each of these events in isolation do not amount to an adverse employment action. (Pl. Resp. at 18). Twisdale thus argues that the combination of these events had an adverse impact on his career. This argument fails for two reasons. First, Twisdale himself does not cite to controlling Seventh Circuit case law which supports this proposition. Second, even were this the law,

these events did not have a cumulative effect on his career that was adverse. In fact, it is undisputed that Twisdale did not experience any loss in pay, grade or benefits. Rather, he received the most generous performance awards of his career, served on five national task forces, and was promoted to his current GS-15 level management position. These undisputed facts warrant summary judgment in favor of the Defendant on Twisdale's retaliation claim.

B. Hostile Work Environment

A plaintiff may also establish a Title VII violation by proving that discrimination based on race has created a hostile or abusive work environment. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986). The harassment must be so "severe or pervasive" as to "alter the conditions of [the plaintiff's] employment and create an abusive working environment.''' Id. At 67 (1986) (quoting Henson v. Dundee, 682 F2d 897, 902 (11th Cir. 23 1982)). Whether the work environment can correctly be termed "hostile" turns on a variety of factors. These include: "the frequency of the discriminatory conduct; its severity; whether it is psychologically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Harris v. Forklift Systems, Inc. 510 U.S. 17, 23 (1993). The court must also "assess the impact of the harassment upon the plaintiff's work environment both objectively and subjectively." Hostetler v. Quality Dining, Inc., 218 F3d 798, 807 (7th Cir. 2000). Thus,the court considers "not only the actual effect of the harasser's conduct on his victim, but also the effect similar conduct would have on a reasonable person." Dey v. Colt Construction & Developmetn Co., 28 F3d 1446, 1454 (7th Cir. 1994) (citing Saxton v. American Tel. & Tel. Co., 10 F3d 526, 534 (7th Cir. 1993)). The acts of which Twisdale complains include (1) being subjected to an audit; (2) being threatened with the removal of the Disclosure

Office; (3) undercutting his authority to address Madison's performance problems and misconduct; and (4) the denial of acting assignments. (Pl. Resp. at 30-31). These acts simply do not rise to the level of an actionable hostile work environment claim. Indeed, Twisdale himself does not explain how any of these actions, either individually or collectively, constitute a hostile work environment.

Twisdale's claim is further flawed by his failure to link these acts to his race. In order to succeed, Twisdale must show that the evidence as a whole creates a reasonable inference that he was discriminated against because of his race. See Hardin v. S.C. Johnson & Son, Inc., 167 F3d 340, 345 (7th Cir. 1999). Here, the record is devoid of any facts suggesting that any of the specific conduct identified by Twisdale is because of his race. Accordingly, the court finds Defendant's motion should be granted on Twisdale's hostile work environment claim.

IV. Conclusion

For the reasons stated above, the court GRANTS Defendant's Motion for Summary Judgment.

SO ORDERED this 27 day of February 2002.

RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

Distribution:

Michael K. Sutherlin
Sutherlin & Betz
1300 First Indiana Plaza
135 North Pennsylvania Street
Indianapolis, IN 46204

James P. Hanlon
Office of the United States Attorney
10 West Market Street, Suite 2100
Indianapolis, IN 46204

No. 03-310

In the Supreme Court of the United States

JAMES B. TWISDALE, PETITIONER

v.

JOHN W. SNOW, SECRETARY OF THE TREASURY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
SUSAN W. BROOKS
United States Attorney
MARLEIGH D. DOVER
MARK S. DAVIES
Attorneys
Department of Justice
Washington, D.C. 20530-0001
202-514-2217

QUESTIONS PRESENTED

1. Whether Title VII's prohibition of discrimination against an employee "because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]," 42 U.S.C. 2000e-3(a), applies to an employee who participates in a Title VII proceeding on the side of the employer.

2. Whether petitioner was subject to a hostile work environment.

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In the Supreme Court of the United States

No. 03-310

JAMES B. TWISDALE, PETITIONER

v.

JOHN W. SNOW, SECRETARY OF THE TREASURY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A6) is reported at 325 F.3d 950. The opinion of the district court (Pet. Supp. App. A1-A21) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. B1) was entered on April 10, 2003. The petition for a writ of certiorari was filed on July 3, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner James B. Twisdale, a white male, is an employee of the Internal Revenue Service (IRS). In his position as Chief, Quality Measurement Branch in Indianapolis, petitioner indirectly supervised Barry Madi-

son, a black female, GS-11 disclosure specialist. In an annual performance review, Madison's immediate supervisor, Mary Lou Graham, rated Madison's performance at a "3" ("fully satisfactory") instead of a "4." Petitioner signed this review. Madison contacted an Equal Employment Opportunity (EEO) counselor to allege that Graham had discriminated against her based on her sex and race. Pet. Supp. App. A2-A5.

On January 27, 1998, petitioner met with the EEO counselor to discuss Madison's claims and negotiate a settlement. Petitioner did not reach a settlement agreement with Madison. District Director James Rogers, on the advice of the Acting Examination Chief, reached an agreement granting Madison all the relief she requested. Pet. Supp. App. A4-A5.

Thereafter, petitioner was asked by his immediate supervisor to initiate an administrative investigation into whether Madison violated time and attendance policies, had an improper social relationship with Rogers, or engaged in other misconduct. Pet. Supp. App. A6. Petitioner concluded that Madison had improperly used her husband's parking space and issued her a counseling memorandum. *Id.* at A8. Madison filed a grievance with the IRS seeking $25,000 and removal of the memorandum from her file. Mary Murphy, the new Chief of the Examination Division, instructed petitioner to remove the memorandum from the file. *Ibid.*

A few months later, petitioner submitted a memorandum to Murphy entitled "Continued Acts of Retaliation." Pet. Supp. App. A14. He alleged that during a meeting IRS employees made "gestures of 'disbelief' after [petitioner] asked a question" and stated that this was part of a "concerted effort by Mr. Rogers, you, and select others as continued acts of retaliation for my

involvement in the EEO process." *Id.* at A14-A15. Throughout this period, petitioner received favorable performance reviews and performance-based bonuses, and he was later promoted to the position of Field Compliance Territory Manager for Small Business/Self Employment, GS-15, a second level management position in Western Virginia. This position gave petitioner increased pay and responsibilities. *Id.* at A16.

2. After exhausting administrative procedures, petitioner filed a complaint in federal district court alleging retaliation and a hostile work environment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Pet. Supp. App. A1. The acts of retaliation complained of by petitioner included the handling of the Madison investigation, internal audits of some of the programs that he administered (and possible reassignment of employees), a delay in giving him "acting supervisor" assignments, and the removal of the Disclosure Office from his supervision. *Id.* at A17; see Pet. App. A2.

The district court held that the "actions of which [petitioner] complains do not amount to an adverse employment action." Pet. Supp. App. A18. The court found that the events petitioner complained of "did not have a cumulative effect on his career that was adverse." *Id.* at A19. For example, the court concluded that "removal of the Disclosure Office does not constitute an adverse employment action in and of itself because supervision of the Disclosure Office was merely one facet of Twisdale's employment." *Ibid.* The court further found that during the relevant time period, petitioner "received the most generous performance awards of his career, served on five national task forces, and was promoted to this current GS-15 level management position." *Ibid.* Thus, the district court granted

summary judgment in favor of the government on petitioner's retaliation claim. *Ibid.*

The district court also rejected petitioner's hostile work environment claim. "The acts of which [petitioner] complains include (1) being subjected to an audit; (2) being threatened with the removal of the Disclosure Office; (3) undercutting his authority to address Madison's performance problems and misconduct; and (4) the denial of acting assignments." Pet. Supp. App. A19-A20. The district court held that "[t]hese acts simply do not rise to the level of an actionable hostile work environment claim." *Id.* at A20. The court also held that petitioner's "claim is further flawed by his failure to link these acts to his race," and that "the record is devoid of any facts suggesting that any of the specific conduct identified by [petitioner] is because of his race." *Ibid.*

3. The court of appeals affirmed. Pet. App. A1-A6. On the retaliation claim, the court concluded that petitioner's participation in the EEO counseling session did not constitute "protected activity," because he participated on the side of the employer. The court characterized the legal question as "novel" and as "a pure issue of law [that] we can with propriety decide * * * despite its not having been briefed." *Id.* at A3. The court acknowledged that, "[r]ead literally, the provision protects even an employee who like [petitioner] participates in an investigation on the side of the employer rather than on the side of the employee who made the charge of discrimination." *Ibid.* But, the court reasoned, the retaliation provision is "for the protection of the discriminated against, and not their opponents." *Id.* at A4-A5. Thus, although petitioner's claim "comes within the literal terms of section 2000e-3(a),"

the court concluded that this "merely show[s] the limitations of literalism as a mode of interpretation." *Ibid.*

As to the hostile work environment claim, the court found that "the performance bonuses, the task force appointments, and the promotion to a more responsible and better-paying job go quite far enough to cancel, in any objective assessment, any unpleasantness that [petitioner] might have experienced." Pet. App. A6. "In any event," the court continued, "that unpleasantness, even if not balanced by rewards both tangible and intangible, falls short of the level of severity required to trigger judicial intervention under Title VII." *Ibid.* That is so, the court held, because Title VII "does not protect the hypersensitive employee who is not deliberately targeted by the employer from the irritations endemic to the employment relation." *Ibid.*

ARGUMENT

Petitioner contends that there is a conflict in the circuits warranting further review on the question whether an individual who supervises an employee accused of discrimination and discusses the accusations with an EEO official engages in activity protected from retaliation under Title VII. Although the Seventh Circuit's holding that such activity is not protected by Title VII is inconsistent with the text of the statute, established Equal Employment Opportunity Commission (EEOC) guidance, and the decisions of other courts of appeals, further review of the issue is not warranted in this case for two reasons. First, resolution of the question by this Court would be premature. The Seventh Circuit decided the issue without the benefit of briefing by the parties, and it mistakenly believed that it was deciding a "novel" issue, rather than creating a conflict with decisions of other courts of appeals and

disregarding a settled interpretation of Title VII by the EEOC. Pet. App. A3. Accordingly, there is reason to believe that the Seventh Circuit may revisit the issue once it recognizes the mistaken assumptions on which it based its decision. Second, this case does not present an appropriate vehicle to resolve the question in any event because the answer to the question would not affect the outcome of this case. As the district court correctly held, petitioner failed to establish a retaliation claim even assuming his participation in the EEOC investigation was protected by Title VII.

Petitioner also argues that the court of appeals incorrectly analyzed his hostile work environment claim. The fact-bound decision of the court of appeals rejecting petitioner's hostile work environment claim is correct and does not conflict with any decision of this Court or of any court of appeals. Accordingly, further review of that question is also unwarranted.

1. a. The participation clause of Title VII's prohibition on retaliation provides that "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees * * * because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. 2000e-3(a). As several courts of appeals have noted, that prohibition is "straight-forward and expansively written." *Merritt* v. *Dillard Paper Co.*, 120 F.3d 1181, 1186 (11th Cir. 1997); accord *Deravin* v. *Kerik*, 335 F.3d 195, 203 (2d Cir. 2003) ("the explicit language of § 704(a)'s participation clause is expansive and seemingly contains no limitations"); *Glover* v. *South Carolina Law Enforcement Div.*, 170 F.3d 411, 414 (4th Cir. 1999) ("A straightforward reading of the statute's unrestrictive language leads inexorably to the conclusion that all testimony in

a Title VII proceeding is protected against punitive employer action."). The term "testified" in Section 2000e-3(a) "is not preceded or followed by any restrictive language that limits its reach." *Merritt*, 120 F.3d at 1186. So too, the phrase "participated in any manner" is without limitation and appears deliberately designed to be inclusive. See *ibid.*; *Glover*, 170 F.3d at 414. Cf. *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'").

There are sound policy reasons why Congress enacted a broad participation clause. To begin with, Congress was concerned about protecting processes designed to identify and remedy meritorious discrimination claims. Providing protection to all who participate in the Title VII investigation serves to protect individuals who help separate the meritorious from the non-meritorious claims. Moreover, a "Title VII claimant can be assisted as much or more by the testimony of a hostile co-employee from whom the truth must be wrenched as by an employee who earnestly desires to help (but may not be in the position to do so)." *Merritt*, 120 F.3d at 1186-1187. "Congress could well have decided that encouraging truthful testimony by even [discriminators] themselves was important enough to vindication of Title VII claims to justify whatever deleterious effect it might have on the vigor with which employers discipline guilty employees." *Id.* at 1188-1189. See *Deravin*, 335 F.3d at 204 ("it may well advance the remedial purpose of Title VII to shield all participation, including participation by an employee accused of illegal discrimination, to ensure the overall integrity of the administrative process and encourage truthful testimony").

None of this means that participation in the Title VII process will immunize a discriminator for the underlying discriminatory conduct. Although an employer may not discipline a discriminating individual based on the individual's participation in a Title VII proceeding, the employer remains free to discipline the discriminating individual for his discrimination. *Merritt*, 120 F.3d at 1188. See *Deravin*, 335 F.3d at 205 ("We emphasize that Title VII only protects the specific act of *participating* in administrative proceedings—not the *underlying conduct* which is being investigated.").

For the above reasons, the EEOC has endorsed the Eleventh Circuit's construction of Title VII's participation clause in *Merritt* v. *Dillard Paper Co.*, *supra*, as encompassing *all* testimony in connection with a Title VII charge, and it has explained that the "participation clause protects those who testify in an employment discrimination case about their own discriminatory conduct, even if such testimony is involuntary." EEOC Compliance Manual § 8-II(C)(1) & n. 24 (1998).

b. In this case, petitioner supervised an employee accused by another employee of discrimination and discussed the accusations with an EEO official. Title VII "participation" begins once the EEO is contacted. See EEOC Compliance Manual, *supra*, § 8-II(C)(1) n.25 (citing *Hashimoto* v. *Dalton*, 118 F.3d 671, 680 (9th Cir. 1997), cert. denied, 523 U.S. 1122 (1998)). Because petitioner discussed with an EEO official an employee's discrimination charges, petitioner "has * * * participated in any manner in an investigation" under Title VII. Accord *Merritt*, 120 F.3d at 1186 (involuntary deposition testimony in Title VII suit is protected activity); *Deravin*, 335 F.3d at 204 ("defending oneself against charges of discrimination" in EEO proceedings is protected activity).

The court of appeals held that Title VII's participation clause does not protect petitioner because he participated "on the side of the employer." Pet. App. A3. It acknowledged that, "[r]ead literally, the provision protects even an employee who like [petitioner] participates in an investigation on the side of the employer rather than on the side of the employee who made the charge of discrimination." *Ibid.*; see *id.* at A4 ("[Petitioner] did participate in an investigation of a discrimination charge, and so comes within the literal terms of section 2000e-3(a)."). But it rejected a "literal" reading of the statute because it believed that such a reading would not "promote the policy of Title VII," which it narrowly defined as "the protection of the discriminated against, and not their opponents." *Id.* at A5.

As the Fourth Circuit explained in *Glover* v. *South Carolina Law Enforcement Div.*, *supra*, however, Title VII's anti-retaliation protections "ensure not only that employers cannot intimidate their employees into foregoing the Title VII grievance process, but also that investigators will have access to the unchilled testimony of witnesses." 170 F.3d at 414. The broadly-worded participation clause reflects a judgment that ensuring that all participants in the Title VII process are unchilled will best protect "the discriminated against" in the long run. The Seventh Circuit's reasoning in this case improperly assumes that Madison (and the claimant in the run of cases) was, in fact, discriminated against. By "opposing" Madison's claims, petitioner was not necessarily opposing an individual who was the victim of unlawful discrimination. Instead, petitioner may have assisted the EEO Official in determining that her claim lacked merit, and thereby served Title VII's broader purposes. Moreover, the court failed to consider that, as explained above, protection of

the discriminated against may require protection of their opponents. See *Merritt*, 120 F.3d at 1186 ("Title VII claimant can be assisted * * * by the testimony of a hostile co-employee."); *Deravin*, 335 F.3d at 204 ("participation by an employee accused of illegal discrimination" necessary to "encourage truthful testimony").[1]

In addition, many cases will involve individuals who cannot be readily classified as one who was "discriminated against" or as "opponent." An employee who advances a truthful account that may absolve the employer of responsibility, but refuses to follow a supervisor's pretextual account lies squarely within the retaliation provision's concern, but is not readily classified under the Seventh Circuit's opinion. Likewise, the Fourth Circuit in *Glover* confronted an employee who was retaliated against by her then-current employer for testimony in an employment dispute involving a previous employer. See 170 F.3d at 412-413. The variety of retaliation scenarios underscores the need for an

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[1] The court of appeals below was concerned that if, "hypothetically," petitioner "had opposed Barry Madison's charge of race and sex discrimination because he is a racist and a sexist," then his employer should be permitted to fire him "for having opposed her * * * charge." Pet. App. A3. But, as the Eleventh Circuit explained in *Merritt*, *supra*, "Congress could well have decided that encouraging truthful testimony by even [discriminators] themselves was important enough to vindication of Title VII claims to justify whatever deleterious effect it might have on the vigor with which employers discipline guilty employees." 120 F.3d at 1188; accord *Deravin*, 335 F.3d at 204-205 (finding *Merritt*'s reasoning and the EEOC's guidance endorsing it "persuasive," and noting that "it may well advance the remedial purpose of Title VII to shield all participation, including participation by an employee accused of illegal discrimination, to ensure the overall integrity of the administrative process and encourage truthful testimony").

inclusive protection and highlights the limits of the Seventh Circuit's textually unmoored restriction of protection to those who claim discrimination.

c. The court of appeals may have reached its narrow construction of Title VII's participation clause because it did not have the benefit of briefing on the issue. The court indicated that it thought the issue was "novel," but that because it was a purely legal question that was "ventilated" at oral argument, the court could "with propriety decide it despite its not having been briefed." Pet. App. A3.[2] Moreover, the court of appeals emphasized that it could find no court decision or other authority addressing the issue:

> We cannot find any hints in the *case law*, the legislative history, *interpretations by government agencies*, or scholarly commentary of any purpose of protecting employees whose resistance to charges of discrimination made by their coworkers provokes the employer's ire. Until this case, so far as we can determine, everyone concerned in the administration of Title VII and cognate federal antidiscrimination statutes had assumed that the retaliation provision was for the protection of the discriminated against, and not their opponents.

Id. at A4 (emphasis added). But, as demonstrated above, it is simply wrong to say that there is no case

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[2] In the district court, the government argued that petitioner's conduct was not within Title VII's anti-retaliation provision. In the court of appeals, however, the government elected not to brief that issue because it was not the basis of the district court's favorable decision. When asked about the issue at oral argument in the court of appeals, the government stated only that the issue was raised in the district court. The government did not seek affirmance on that basis.

law or agency interpretations explaining why it is necessary to protect employees who resist charges of discrimination. Had the parties briefed the issue or otherwise brought the relevant authorities to the court's attention, the court would have learned of the Eleventh Circuit's oft-cited *Merritt* decision, as well as the EEOC's endorsement of that decision in its Compliance Manual. The court's opinion emphasizing the absence of such authority suggests that it might have reached a different result had the court known of the applicable case law and agency views.

Moreover, the decision below was reached before the Second Circuit's *Deravin* decision, which found the "reasoning and analysis of *Merritt* persuasive" and noted the EEOC's endorsement of that reasoning in its Compliance Manual. 335 F.3d at 204. In these circumstances, where a single court of appeals believes it is deciding a "novel" issue but where in fact applicable case law and agency interpretation exists, further review by this Court may be premature. The Seventh Circuit may itself revisit the issue once it recognizes the mistaken assumptions upon which its decision rests and that its decision in this case has unwittingly created a conflict not only with the Eleventh Circuit's decision in *Merritt*, but now with the Second Circuit's decision in *Deravin* as well. See 7th Cir. R. 40(e) (permitting a panel of the court to overrule a prior panel decision without rehearing en banc if a majority of the active judges agree). Should the circuit split remain or deepen, the Court may review the issue at that time.

d. In any event, as the district court correctly recognized, petitioner's retaliation claim fails even assuming his discussions with an EEO official are protected by Title VII. A Title VII plaintiff makes out a prima facie case of retaliation by showing that he engaged in a

protected activity, that he suffered an adverse employment action (*i.e.*, a change to compensation, terms, conditions, or privileges) and that the two were causally related. See 42 U.S.C. 2000e-3(a). The acts of retaliation complained of by petitioner include the handling of the Madison investigation, internal audits (and possible reassignment of employees) of some of the programs that he administered, a delay in giving him "acting supervisor" assignments, and the removal from his purview of the Disclosure Office, which had three employees and is responsible for protecting taxpayer's privacy. See Pet. Supp. App. A17; Pet. App. A2. The district court, however, correctly held that the "actions of which [petitioner] complains do not amount to an adverse employment action." Pet. Supp. App. A18. Petitioner's brief to this Court makes no effort to dispute the district court's conclusions.[3]

2. Petitioner's claim that "the acts of harassment caused against him substantially exceed the High Court's standard for a hostile work environment," Pet. 20, also is undeserving of this Court's review. Title VII prohibits discrimination on the basis of race or sex "with respect to [the employee's] compensation, terms, conditions, or privileges of employment." 42 U.S.C. 2000e-2(a)(1). Harassment so "severe or pervasive" as "to alter the conditions of [the victim's] employment

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[3] To the extent the absence of any adverse employment action to support a retaliation claim does not lead the Court to deny the petition, the proper course would be to grant, vacate, and remand the decision below in light of this brief and the appellate precedents and EEOC guidance that the court below failed to acknowledge. The United States would not object to that course. However, because the court below did not address or acknowledge those authorities, plenary review by this court at this juncture would be premature.

and create an abusive working environment" violates Title VII. *Meritor Sav. Bank* v. *Vinson*, 477 U.S. 57, 67 (1986) (citation omitted); see *Harris* v. *Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (relevant factors include: "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance"). As both the district court and court of appeals recognized, petitioner's complaints are garden-variety personnel gripes and do not amount to a change in the "terms" or "conditions" of employment. See Pet. App. A6 (citing *Pryor* v. *Seyfarth, Shaw, Fairweather & Geraldson*, 212 F.3d 976, 978 (7th Cir. 2000) (collecting cases), and *Andrews* v. *City of Philadelphia*, 895 F.2d 1469, 1483 (3d Cir. 1990)); see also *Oncale* v. *Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 81-82 (1998).

Petitioner also suggests that the court of appeals placed too much weight on his bonuses and promotion. Pet. 16, 26. But, as the court of appeals explained, any "unpleasantness, even if not balanced by rewards both tangible and intangible, falls short of the level of severity required to trigger judicial intervention under Title VII." Pet. App. A6. In any event, such fact-bound determinations do not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
PETER D. KEISLER
Assistant Attorney General
SUSAN W. BROOKS
United States Attorney
MARLEIGH D. DOVER
MARK S. DAVIES
Attorneys

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No. 03-310

In The

Supreme Court of the United States

JAMES B. TWISDALE,

Petitioner

v.

JOHN W. SNOW, Secretary of the Treasury,

Respondent

On Writ of Certiorari to the
Untied States Court of Appeals
For the Seventh Circuit

REPLY BRIEF FOR THE PETITIONER

JAMES B. TWISDALE
103 E. MCCLURE DR.
SCOTT DEPOT, WV 25560
304-757-4738
December 4, 2003

QUESTIONS PRESENTED FOR REVIEW

Introduction to Question 1

The Seventh Circuit ruled that the protection offered under *42 U.S.C. 2000e-3(a)* is restricted to only employees who have made a charge of discrimination. Stating that the issue "is both clean and novel" and no case law or scholarly commentary existed. Case law and scholarly commentary does exist, all of which supports a literal and all inclusive interpretation as intended by Congress.

1. Does the protection offered under Section *42 U.S.C. 2000e-3(a)* for employees who have made a charge, testified, assisted, or participated in any manner in an EEOC investigation apply to all employees with no regard to their role in the alleged acts of a Title VII violation?

Introduction to Question 2

The Seventh Circuit in its analysis of a hostile work environment did not apply the standards established by the Supreme Court in the cases of *Harris v. Forklift Systems, Inc* and more recently *Oncale v. Sundowner Offshore Services, Inc.* correctly. The court below further imposed new criteria that subsequent job assignments and a promotion will cancel out any previous inflicted harassment.

2. Did the Plaintiff suffer a hostile work environment sufficient to affect his compensation, terms, conditions, or privileges of employment, under *42 U.S.C. 2000e-2(a)(1)* and if so, would other job assignments, performance bonuses and a promotion cancel out the harassment?

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For the Seventh Circuit

REPLY BRIEF FOR THE PETITIONER

ARGUMENT

THE SEVENTH CIRCUIT ERRED IN INTERPRETING AND APPLYING 42 U.S.C. 2000e-3(a)

The Petitioner is pleased that the Respondent concurs with his position on the correct interpretation of *42 U.S.C. 2000e-3(a).* There is no further need to argue this matter.

The Respondent believes resolution by the High Court of this issue, an issue they admit the petitioner is correct on, would be "premature". Resp. P5. Their reason is that "the Seventh Circuit may revisit the issue once it recognizes the mistaken assumptions on which it based its decision." Resp. P6. With all due respect, permitting a known and admitted injustice is an injustice in itself. We teach our children "two wrongs do not make a right". But there are more compelling reasons for the High Court to rectify this wrong. What if the Seventh Circuit does not self correct its decision? What if it takes another 10 years before an opportunity for such a correction can present itself? To allow a known and admitted incorrect decision at the Appellate level stand will have wide ramifications. For example, cases like Mr. Twisdale's will never even reach the Seventh Circuit because its very own decision will discourage plaintiffs and attorneys to raise the issue. Furthermore, attorneys will discourage clients from pursuing their rights under Title VII if they believe their client is not protected. Jobs and careers could be lost and lives disrupted. Finally, an unresolved conflict in the circuits can only lead to greater conflict and confusion.

As a second reason for not accepting the case the Respondent claims the Plaintiff will still fail because the acts of retaliation do not meet an "adverse employment action" and the acts of harassment were not "severe or pervasive" as "to alter the conditions of employment and create an abusive working environment". Resp. P12 & 13. Furthermore, the Respondent claims the lower courts decisions do not "conflict with any decision of this Court or of any court of appeals". Resp. P 6. The Plaintiff disagrees for the reasons already argued in his Petition and further discussed in the second argument of this Reply.

ARGUMENT

THE SEVENTH CIRCUIT ERRED IN INTERPRETING AND APPLYING 42 U.S.C. 2000e-2(a)(1)

The Respondent does not refute the arguments made and facts presented by the Plaintiff in his Petition. Rather they only concur with the lower courts decisions. They concur that the acts of retaliation against the Plaintiff "do not amount to an adverse employment action". Resp. P13. And that the same acts for harassment purposes are not "severe or pervasive" as "to alter the conditions of [the victim's] employment and create an abusive working environment" *Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986); see Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993)....* Resp. P13 & 14. The Respondent goes on to call the acts of retaliation/harassment as "garden-variety personnel gripes and do not amount to a change in 'terms' or 'conditions' of employment". In support of this they cite the same three cases used by the Court below *(Pryor v. Seyfarth, Shaw, Fairweather & Geraldson, 212 F.3d 976, 978 (7th Cir. 2000)(collecting cases) and Andrews v. City of Phildelphia, 895 F.2d 1469, 1483 (3d Cir. 1990)); see also Oncale v. Sundowner Offshore., Inc., 523 U.S. 75, 81-82 (1998).* Resp. P14.

Analysis of Respondent Cited Cases

Assessment of the three latter cases reveals acts of harassment different from what the Plaintiff experienced and conclusions unsupportive of their point. In the case of *Andrews v. City of Philadelphia*, the facts and outcome resulted in the Third Circuit vacating and remanding the case for further consideration on the Title VII harassment claims; clearly favoring the Petitioner in the instant case. In *Oncale*

v. Sundowner Offshore., Inc. the case was remanded by the High Court because the Fifth Circuit erred in concluding that same sex harassment was not actionable under Title VII. It also reiterated it's holding in *Harris v. Forklift Systems, Inc., 510 U.S. (1993)* that "the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.'" It would appear that in the Seventh Circuit's haste to dismiss Mr. Twisdale's case, the rule of law may not have been fully considered and other mistakes made as in the first issue of "protection".

A brief analysis of each of the above three cases will help explain the Petitioners comments. In *Pryor v. Seyfarth, Shaw, Fairweather & Geraldson,* the acts of harassment only amounted to four brief comments from the supervisor of a sexual nature. There is no similarity to the instant case. Further, the case was remanded by the Seventh Circuit because the act of terminating the petitioner's employment met the retaliation standard. In *Andrews v. City of Phildelphia* the lower courts decision was vacated and the case remanded because the harassment standards were met. Judge Rosenn of the Third Circuit wrote:

> Thus, in reconsidering this factor on remand, the trial judge should look at all of the incidents to see if they produce a work environment hostile and offensive to women of reasonable sensibilities. The evidence in this case includes not only name calling, pornography, displaying sexual objects on desks, but also the recurrent disappearance of plaintiff's case files and work product, anonymous phone calls, and destruction of other property. The court should view this evidence in its totality, as described above, and reach a determination.

This case is much more similar to Mr. Twisdale's because they both had to endure acts of harassment for an extended period of time, acts that would offend if not frighten (as in Mr. Twisdale's case) the "sensibilities" *(Id.)* of a "reasonable person" (*Oncale v. Sundowner Officeshore Services, Inc. 523 U.S. 75 (1998)).* Furthermore, the acts were numerous, severe and pervasive, just as in the instant case.

In *Oncale v. Sundowner Offshore., Inc.* the petitioner was forcibly subjected to sex-related, humiliating actions, physically assaulted in a sexual manner and threatened with rape. All of which lead the petitioner to quit. The High court concluded that same sex discrimination consisting of same-sex sexual harassment (the only issue before it) was actionable under Title VII and remanded the case for further proceedings. This case like the one before favor Mr. Twisdale. The High Court could have decided on the acts of harassment but did not have to because the acts met the standards as established in *Harris v. Forklift Systems, Inc., 510 U.S. (1993).* The acts against Mr. Twisdale were also "humiliating" such as February 10th meeting to intimidate, the numerous (156 times) denied acting assignments, and removal from an acting assignment. Although not physically assaulted, the criminal investigation could have resulted in Mr. Twisdale's imprisonment and the various unprecedented and unauthorized audits could have also ended in his removal, and the threatened rape like Mr. Roger's threat to remove Mr. Twisdale's staff in his Disclosure Office are similar only in that they are threats designed to intimidate and frighten. However, the threat against Mr. Twisdale was eventually carried out when several months later the Disclosure Office was removed from his responsibilities.

Standard for Harassment - Summary

Audits of program areas where the requesting official could not produce a single business reason for requesting it and where the request was unauthorized and unprecedented, retaliatory criminal investigations, threats, removal of responsibilities, and numerous denied acting assignments can not be considered by a "reasonable person" *(Oncale v. Sundowner Officeshore Services, Inc. 523 U.S. 75 (1998))* as a "garden-variety personnel grip". When organizational resources are brought to bear through the deliberate misuse of IRS authority, then the "terms" or "conditions" of employment have been instantly changed. Simply put, "reasonable person(s)" do not sign on with an expectation that the employer will subject them to unauthorized and/or unjustified activity.

To maintain the standard that harassment must result in poor performance, removal from a position or job, resignation or an adverse action is not balanced with real life. Some people perform at a higher level when faced with adversity, stress or confrontation. Policemen, fireman, soldiers, etc. may find themselves in situations where they must either act or run for safety. When they choose to act their deeds are sometimes called heroism. In Mr. Twisdale's case he chose to act. He volunteered for as many assignments as possible and raised the level of his performance in an attempt to counter the on going harassment. The bonuses and promotion received were not in payment for the harassment inflicted. To imply this as the Seventh Circuit has only reflects a judicial body out of touch with reality.

As indicated in footnote 3 on page 13 of the Respondent Brief, the Respondent realizes the injustice of the lower courts' decision and the potential impact it may have if allowed to stand. The Petitioner like the United States would

not object that the "proper course would be to grant, vacate, and remand the decision below..."

The Seventh Circuit has not followed the standards set by the High Court. Rather as it did with the first issue of "protection", it elevated and rewrote the standard for harassment to a near impossible level and one inconsistent with the decisions of the High Court.

Adverse Employment Action - Not an Issue

The Respondent states that the district court "held that the 'actions of which [petitioner] complains do not amount to an adverse employment action'". Resp P13. In the sense that such an action required the Petitioner's termination, demotion or some form of discipline then they are correct. However, the Court below did not find against the petitioner for not meeting a standard for an adverse employment action in regards to the Retaliation argument. Rather, its entire focus was on the protection clause under *42 U.S.C. 2000e-3(a)*. The Petitioner asks the High Court that this issue not be considered since the court below made no decision on its merits.

Circuits are widely divided on the Interpretation of an Adverse Employment Action

In the event this is an issue, it is the Petitioners position that the federal judicial circuits are widely divided as to what qualifies as an adverse employment action. The standards range from a narrow definition focusing on the "ultimate employment decision," to a very broad and liberal definition of a decision affecting some term or condition of employment.

The Fifth and the Eight Circuits have followed the holding in *Page v. Bolger (645 F.2d 227 (4th Cir.1981)(en banc),*

cert.denied, 454 U.S.892 (1981)) both requiring an ultimate employment decision to trigger Title VII. In *Dollis v. Rubin (77 F.3d 777 (5th Cir. 1995))* the Fifth Circuit held that "*Title VII* was designed to address ultimate employment decisions. The Eight Circuit in *Ledergerber v. Stangler (122 F.3d 1142 (8th Cir. 1997))* likewise mandated that an adverse employment action must "rise to the level of an ultimate employment decision" to trigger *Title VII.* The most recent break with this restrictive standard came from the Ninth Circuit in *Ray v. Henderson (217 F.3d 1234 (9th Cir. 2000)).* In reaching its conclusions, the Ninth Circuit cited *42 U.S.C. 2000e-3(a),* the retaliation statute, which states "it is unlawful 'for an employer to discriminate' against an employee in retaliation for engaging in protected activity." The *Ray* court further opined that the statutory language to bring a retaliation suit "does not limit what type of discrimination is covered, nor does it prescribe a minimum level of severity for actionable discrimination." The Ninth Circuit concluded that *42 U.S.C. 2000e-3(a)* does "not limit its reach only to acts of retaliation that take the form of cognizable employment actions such as discharge, transfer or demotion." *Ray v. Henderson quoting Passer v. Chem. Soc., 935 F.2d 322, 331 (D.C. Cir. 1991).* The Equal Employment Opportunity Commission (EEOC) sets forth this same standard. Circuits using the broadest definitions—the First, Seventh, Tenth, Eleventh, and D.C.—have taken an expansive view of the type of actions that can be considered adverse employment actions. The Second and Third hold an intermediate position: "an adverse action is something that materially affects the terms or conditions of employment." *Ray v. Henderson at 1242 (citing Torres v. Pisano, 116 F.3d 625, 640 (2d Cir. 1997); Roberson v. City of Pittsburgh, 120 F. 3d 1286, 1300 (3d Cir. 1997)).*

Petitioner Meets the Seventh Circuit's Retaliation Standard

Recently in *Siegfried Herrnreiter v. Chicago Housing Authority (315 F.ed 742 2002)* the Seventh Circuit opined its reasoning as to what qualifies as retaliation.

> We do not mean to suggest ... that retaliation, to be actionable under Title VII (or other statutes), has to involve an adverse employment action. It does not. *Aviles v. Cornell Forge Co., 183 F.3d 598, 605-06 (7th Cir. 1999), Aviles v. Cornell Forge Co., 241 F.3d 589, 593 (7th Cir. 2001); Passer v. American Chemical Society, 290 U.S. App. D.C. 156, 935 F.2d 322, 331-32 (D.C. Cir. 1991); EEOC Compliance Manual 8, P 8008 (1998)(directive No. 915.003); see also Veprinsky v. Fluor Daniel, Inc., 87 F.3d 881, 891-92 (7th Cir. 1996).* Some cases reach this conclusion by interpreting "adverse employment action" in the retaliation context as not requiring an actual employment action; an example is *Berry v. Stevinson Chevrolet, 74 F.3d 980, 986-87 (10th Cir. 1996),* where the retaliation took the form of preferring charges of theft and forgery against an employee who had filed a charge of discrimination. See also *Ray v. Henderson, 217 F.3d 1234, 1242-43 (9th Cir. 2000).* As we explained in *McDonnell v. Cisneros, 84 F.3d 256, 258-59 (7th Cir. 1996).* "No limiting language appears in *Title VII's* retaliation provision. *42 U.S.C. 2000e-3(a).* The language of 'materially adverse employment action' that some courts employ in retaliation cases is a paraphrase of *Title VII's* basic prohibition against employment discrimination, found in *42 U.S.C. 2000e-2(a)(1) and (2)*... The provision regarding retaliation may intentionally be broader, since it is obvious that

effective retaliation against employment discrimination need not take the form of a job action."

It is the Petitioner position that the Court below stopped its analysis of the retaliation argument when it denied Mr. Twisdale protection under *42 U.S.C. 2000e-3(a)*. If it had reviewed the acts of harassment in the light of retaliation then Mr. Twisdale would have certainly prevailed given the above reasoning. To further illustrate, the above case of *Berry v. Stevinson* survived the retaliation standard when the plaintiff was charged with theft and forgery by the employer. This is no different than the instant case were IRS management made charges against Mr. Twisdale involving a serious breach of security, abuse of authority, and for making an unauthorized disclosure, all or any of which could have resulted in his termination or imprisonment. Furthermore, these same allegations lead to a criminal investigation against the Petitioner.

Conclusion

For the foregoing reasons, the judgement of the Seventh Circuit should be reversed and the case remanded for trial on the Retaliation and/or Harassment charges.